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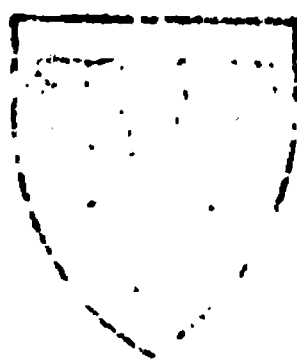
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REPORTS  
OF  
Cases in Law and Equity  
DETERMINED IN THE  
SUPREME COURT  
OF THE  
STATE OF NEW YORK.

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BY OLIVER L. BARBOUR, LL. D.

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VOL. XXXVI.

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*Rec Oct-27, 1861*

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# JUSTICES OF THE SUPREME COURT,

## DURING THE YEAR 1862.

---

### FIRST JUDICIAL DISTRICT.

- CLASS 1. JOSIAH SUTHERLAND.\*  
" 2. DANIEL P. INGRAHAM.†  
" 3. WILLIAM H. LEONARD.  
" 4. GEORGE G. BARNARD.  
" 5. THOMAS W. CLERKE.‡

### SECOND JUDICIAL DISTRICT.

- " 1. JAMES EMOTT.†  
" 2. JOHN W. BROWN.  
" 3. WILLIAM W. SCRUGHAM.  
" 4. JOHN A. LOTT.‡

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" 2. HENRY HOGEBOOM.†  
" 3. RUFUS W. PECKHAM.  
" 4. THEODORE MILLER.§

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" 2. PLATT POTTER.  
" 3. AUGUSTUS BOCKES.  
" 4. AMAZIAH B. JAMES.‡

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- " 2. JOSEPH MULLIN.†
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- " 3. JOHN M. PARKER.
- " 4. CHARLES MASON.‡

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- " 2. THOMAS A. JOHNSON.‡
- " 3. ADDISON T. KNOX.¶
- " " JAMES C. SMITH.\*\*
- " 4. HENRY WELLES.‡

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- " 1. RICHARD P. MARVIN.‡
- " 2. NOAH DAVIS, JUN.
- " 3. MARTIN GROVER.
- " 4. JAMES G. HOYT.§

DANIEL S. DICKINSON, *Attorney General*.

\* Sitting in the Court of Appeals.

‡ Re-elected, November, 1861.

† Presiding Justice.

§ Elected, November, 1861.

¶ Resigned, May, 1862.

\*\* Appointed by the Governor, in place of Addison T. Knox, resigned.

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CASES

Law and Equity

IN THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

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HICKOX *vs.* FAY, Sheriff, &c.

An execution issued upon a judgment recovered on a note, a portion only of the consideration of which consists of a demand for the purchase money of articles exempt from levy and sale under execution, cannot legally be levied upon such of the debtor's property as is exempted from levy and sale under execution by the provisions of chapter 157 of the laws of 1842, and so much of such property sold by virtue thereof as shall be necessary to satisfy so much of the judgment as shall be equal to such portion of the consideration of the note.

The statute does not give a general right to the vendor of any articles of the class of exempt property, to take any other of that species of property for his debt. His right is in the nature of a particular lien on specific property, and does not extend to any other property except the precise property sold.

**A**CTION against the defendant as sheriff of Steuben county, to recover possession of a quantity of tools, upon the ground that they were exempt from levy, &c. The plaintiff was a householder, having a family, &c. and was a daguer-

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Hickox v. Fay.

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rean artist, and the tools were necessary in that business. The defendant justified the taking of the property, under and by virtue of an execution issued upon a judgment against Hickox, recovered by William D. Shuart, for \$138.91, which judgment had been assigned to Richard B. Appleby. The judgment was recovered on a bill of exchange drawn by R. B. Appleby upon the plaintiff and accepted by him, for \$122, on account of a debt, a portion only (\$86) of which was for the purchase price of a tool, (not mentioned in the complaint,) and the balance for the purchase price of property not exempt, &c. The articles of property, to recover which the action was brought, were rendered exempt, &c. by the statute of 1842. (*Laws of 1842, ch. 157.*) The court charged the jury that the defendant had the right to levy the execution upon any property rendered exempt, &c. by the statute of 1842, and sell sufficient thereof to satisfy a portion of the judgment equal to the amount of that portion of the debt included in it, which was created by sale and purchase of property exempt, &c. The plaintiff excepted to this ruling. The following stipulation, signed by the attorneys for the respective parties, presents the only question in the case:

“It is understood and stipulated that the question, and the only question, presented or raised by the first and second exceptions to the charge of the court to the jury as made, is whether an execution issued upon a judgment recovered upon a note, a portion only of the consideration of which consists of a demand for the purchase money of articles exempt from levy and sale under execution, can legally, against the will of the judgment debtor, be levied upon such of his property as is exempted from levy and sale under execution merely by the provisions of chapter 157 of laws of 1842, and so much of such property sold by virtue thereof as shall be necessary to satisfy so much of the amount of said judgment as shall be equal to such portion of the consideration of such note. If it cannot legally be so levied, and such property legally

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Hickox v. Fay.

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so sold, then the said two exceptions are well taken, otherwise not."

The defendant had a verdict. And the case came before the general term on the exceptions, in the first instance, before judgment.

*Geo. B. Bradley*, for the plaintiff. I. The court erred in this charge to the jury, and the exceptions thereto were well taken. (1.) The judgment upon which the execution issued is entire—not severable by the creditor for any purpose—and the execution cannot be deemed to have been "issued on a demand for the purchase money of such tool," within the meaning of the statute. (*Laws of 1842, ch. 157, § 1.*) That can be so only where the creditor would have the right to satisfy the entire execution by sale of property exempt, &c. And it will not be pretended that making a debt, created by sale of exempt property, a part only of the subject of an action and judgment, would give to the entire judgment the remedial character of such part thereof. That would render the statute useless. (2.) The proceeds of sales of property of any kind by the sheriff would be applied upon the judgment generally. The judgment debtor could not compel a special application upon any particular part of it, nor is there any legal recognition of any several part or character of the judgment. The payment of any portion of the judgment could not have any but a general application on the judgment, and could not thereby restrict the levy of execution, so far as respects the character of the property. The sale on execution of exempt property, sufficient to satisfy such portion or amount of the judgment, would not prevent a subsequent sale of property of like character on an execution issued on the same judgment. An action to test the right of the sheriff to make the second levy and sale, could not involve the determination of the character of the property sold upon the prior execution, or the circumstances under which the first sale was made. It follows that to sustain the ruling at the cir-

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Hickox v. Fay.

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cuit, it must, in effect, be held that by including as part of the amount of a judgment a debt for the purchase money of exempt property, the creditor may acquire a greater remedial right in respect to the balance of the debt included in the judgment than he otherwise could have. (3.) The creditor, in all cases, has the power to preserve distinctly and separately any debt created by sale of exempt property. And by uniting a debt thus created with a debt of a different character, for purposes of recovery, the creditor must be deemed to have waived or deprived himself of the right, in respect to the enforcement of the judgment, reserved by the proviso in the statute referred to. (*Lambert v. Snow*, 17 How. 517.) (4.) The creditor in this case having elected to unite these debts of such different remedial characters in the recovery of judgment, the execution issued thereon did not fall within the provisions of that statute. The judgment is an entirety, for all purposes, and the creditor or sheriff in enforcing it by execution cannot resort to a kind of property to satisfy a portion of it that he would not be at liberty to reach to satisfy the whole thereof. (5.) The question involved is analogous to the case of a union of claims or causes of action, as to a part only of which the debtor may be arrested if it were alone the cause of action. (*Code*, § 179.) By such union of causes of action the creditor deprives himself of the right of arrest of the debtor before, and of execution against his person after judgment. (*McGovern v. Payn*, 32 Barb. 83. *Lambert v. Snow*, 17 How. 517. *Miller v. Scherder*, 2 Comst. 262, 267, 8. *Brown v. Treat*, 1 Hill, 225. *Suydam v. Smith*, 7 id. 182.) (6.) If the creditor by a union of debts in his judgment has limited his means of enforcing collection of any portion of it, such restriction is but the result of his own folly.

*John Maynard*, for the defendant.

*By the Court*, E. DARWIN SMITH, J. The charge of the judge that "if the jury found that any part of the debt upon

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Hickox v. Fay.

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which the judgment was recovered, to collect which the execution was issued, was for the purchase price of property which was exempt from levy and sale on execution, then the sheriff was authorized by virtue of such execution to levy upon any of the property enumerated in, and rendered exempt from, levy and sale on execution by the act entitled 'An act to extend the exemption of household furniture and working tools from distress for rent and sale on execution,' passed April 11th, 1842, and sell sufficient of such property to satisfy such part of such debt so included in the said judgment," I think erroneous, and the exception of the defendant's counsel thereto well taken. The judgment was for \$138.91, and it is not pretended that it was recovered on a demand for the purchase money of any of the property levied on by the defendant, except a camera stand, valued at \$20. The theory of the charge is, that if any part of the judgment was recovered for the purchase price of household furniture and other articles exempt from levy and sale on execution under the said act, the sheriff might levy upon any other exempt articles to the amount of the purchase price of such articles included in said judgment. This, I think, involves a radical misconception or misconstruction of the statute. The terms of the statute are explicit. After giving the exemption of household furniture, working tools and team owned by any person being a householder, &c. to the value of \$150, it provides that "such exemption shall not extend to any execution issued on a demand for the purchase money of *such furniture*, or tools, team, or articles now enumerated by law."

The execution must follow the property sold, as if the plaintiff retained a specific lien thereon for the price. It was designed to prevent frauds in the purchase of the exempt class of property, by giving the vendor a right to retake the same on execution, notwithstanding the exemption of the statute, precisely as though he had taken a chattel mortgage on the same, which he was seeking to enforce. The statute

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Hickox v. Fay.

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did not give a general right to the vendor of any of the class of exempt property to take any other of such property for his debt. His right is in the nature of a particular lien on specific property, and does not extend to any other property except the precise property sold. In this particular, the charge was erroneous. It is also erroneous in another view. The plaintiff, I think, had waived his right to follow the property sold by him, though the purchase price therefor was in fact part of the sum for which the judgment was recovered. The judgment was entire, and for part of the amount the plaintiff had no claim to follow any specific property of the judgment debtor, under the provisions of the statute. By taking a judgment for the price of the tools or other exempt property sold to the plaintiff, together with other debts, he must be deemed to have elected to abandon his claim to follow the specific property. The case is in principle within those cases where a right of arrest for a debt fraudulently contracted, or other cause exists, and the creditor unites in one action and recovers judgment for such debt, with other claims in respect to which no such right of arrest and imprisonment on execution exists. In such case it is properly held that the right to arrest and imprisonment is lost by a recovery of a judgment, and the right of arrest at the commencement of the action cannot be exercised or maintained for the amount of the several claims so united in one action. (*Lambert v. Snow*, 17 How. Pr. Rep. 517. *McGovern v. Payn*, 32 Barb. 83. *Miller v. Scherder*, 2 Comst. 262, 267. *Suydam v. Smith*, 7 Hill, 182.)

The party who seeks a peculiar right or remedy in respect to a particular debt must enforce it by itself, and not unite it with other claims. Any other rule would be highly unjust and oppressive. The judgment in this case is an entire one, and the debtor cannot pay any particular part thereof and save his property otherwise exempt under the statute. If the rule adopted at the circuit was correct, and he might thus, at the election of his creditor, to whom he might owe two



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 Myrick v. Selden.
 

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debts, one a small one for fraud, and another large one for some other consideration, lose the benefit of the statute entirely.

A new trial should be granted, with costs to abide the event.

[MONROE GENERAL TERM, September 2, 1861. *Smith, Johnson and Knox, Justices.*]

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 MYRICK vs. SELDEN and others.
 

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In proceedings supplementary to execution, the court does not appoint more than one person receiver of the property of the judgment debtor, however numerous may be the creditor's bills or supplementary proceedings against him; inasmuch as such appointment in one suit or proceeding completely divests the debtor of his title to all his property.

An action will not lie by one judgment creditor, against another, for the purpose of determining the question as to the priority of their respective liens upon the equitable property of the judgment debtor in the hands of the receiver.

The commencement of a suit in equity, by the service of a summons and injunction, creates a *lis pendens* and a lien in the nature of an attachment or a statute execution, upon the equitable property of the defendant. But the plaintiff is bound to prosecute his action diligently, to retain his lien; or it will cease, like that of a dormant execution.

A delay of eight years, by the plaintiff, in the prosecution of his suit, will be deemed an abandonment or waiver of his prior right acquired by the commencement of the suit, as against a subsequent creditor who has, in the meantime, by his vigilance, discovered and reached a fund sufficient to satisfy his claim.

**A**PPEAL from an order made at a special term, sustaining a demurrer to the supplemental complaint.

On the 5th of July, 1851, Albert G. Myrick and Josiah W. Myrick (the latter now deceased) recovered a judgment against Ansel Frost and Harmon Hibbard, for \$5936.09, and execution thereon was returned wholly unsatisfied, September 21, 1851. In August, 1851, Albert G. Myrick caused a writ of *ne exeat* to be issued against Frost, to the sheriff

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Myrick v. Selden.

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of Monroe, where Frost resided ; but Frost eluded the sheriff, and fled from the state to New England. In December, 1851, the original suit (to which this suit is supplemental) was commenced by Myrick against Frost and Samuel Rand ; the latter appeared and caused his answer to be served on the 12th of January, 1852. Many efforts were made by the plaintiff's attorneys to serve the summons upon Frost ; but a short time before it was issued he absconded from the state to avoid such service, which was not finally effected until September 12, 1852. The complaint was the ordinary creditor's bill, as against Frost, and charging Rand with holding a large amount of property belonging to Frost, in trust for him, and to defraud his creditors ; and praying that his (Rand's) claim be declared fraudulent, and the plaintiff's judgment paid out of the property. Also for a receiver and an injunction. Frost answered, not denying the fraudulent transfer to Rand, nor that Rand held the property, as charged in the complaint ; but he denied the facts charged as to his absconding, and as to the issuing of execution against him. Frost also set out a large number of judgments recovered against him, from August 10, 1842, to November 26, 1846, docketed in Onondaga and Monroe counties, and executions issued and returned thereon unsatisfied ; and alleged that Henry R. Selden was the owner of one of said judgments, as surviving plaintiff, and of the others, as assignee. That on the 17th of July, 1852, after the return of all the executions unsatisfied, application was made to the Hon. Daniel Pratt, a justice of this court, upon affidavits, for an order requiring Frost to appear and answer concerning his property, which was granted, requiring him to appear 19th July. The order was duly served, and on the 19th July Frost appeared, and the matter was referred to B. Davis Noxon, jun., and Frost ordered to appear and answer before him. The referee was ordered to examine Frost and all witnesses, &c. Such proceedings were thereupon had, that on the same day (19th July) Nathan F. Graves was appointed by said justice

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receiver of the property and effects of Frost, with the usual powers of receivers in such cases. On the 5th of August the receiver gave the required bail, and on the 6th of August Frost assigned to the receiver all his estate, equitable interests and things in action. Rand in his answer denied the alleged fraud, and all collusion with Frost, and claimed the property as his own. The plaintiff alleges that the proceedings supplementary to execution were had, and Graves appointed receiver, as stated in the answer of Frost; that shortly thereafter, Graves, as such receiver, and the said Henry R. Selden, commenced a suit in this court against Frost and Rand, to obtain the interest of Frost in the property held by Rand. Issue was joined, and the cause referred to Francis Kernan, Esq. to hear and determine, who, after hearing the proofs and allegations of the parties, decided that the claim of Rand was fraudulent, and that he was liable to account for all the property received by him, and to pay over and apply the proceeds to the satisfaction of the judgments mentioned in the proceedings. That an accounting has been had, "and very much testimony has been taken before said referee, and the counsel upon both sides have been heard, but the said referee has not made a final report;" but has proceeded so far as to ascertain that said Rand has as much as ten thousand dollars in his hands, &c. That the cause of action, upon which the plaintiff's judgment was recovered, accrued prior to the transactions between Frost and Rand, and that those transactions were fraudulent as against him; that the original action against Frost and Rand was commenced before the issuing and return of the executions mentioned in the answer of Frost, and prior to the appointment of Graves as receiver, and prior to the assignment of the judgments to Selden; and the plaintiff believes that said Graves and Selden had notice of the commencement of his original action, and the proceedings therein, before the commencement of their action. Prayer, that it be declared that he has priority of lien, and is entitled to priority of payment, out of

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the effects of Frost. General demurrer, by the defendant Selden, at special term.

The following opinion was delivered by the judge on deciding the cause upon the demurrer, at the special term.

JOHNSON, J. "The supplemental complaint shows upon its face that the action was not commenced against the defendant Frost, until after the defendant Selden had regularly instituted and gone through with proceedings supplementary to execution, which resulted in the appointment of a receiver, and the assignment by Frost to such receiver of all his effects for the satisfaction of the judgments, in respect to which such proceedings had been instituted.

It is clear, I think, that the service of the summons upon the defendant Rand was no commencement of the action as against Frost, as they were, in no sense, either joint contractors, or united in interest, as against Frost. Rand, according to the allegations in the complaint, had a complete and perfect title to the property transferred to him, so that their interests, as respects the subject of the action, were entirely distinct and separate, if not entirely hostile.

Under the code, the attempt to commence the action is not equivalent to its actual commencement, even for the purpose of saving the demand from the operation of the statute of limitations, unless it is followed by the first publication of the summons, or by the service thereof, within sixty days. (*Code*, § 99.)

It is contended in behalf of the plaintiff, that by the commencement of the action against Rand, who had Frost's title, he acquired a lien upon the property, over which no other creditor could obtain a preference by a subsequent action or proceedings against Frost, or against Frost and Rand. I am inclined to the opinion that by that proceeding the plaintiff did acquire a lien, which would be effectual as against Rand and all persons claiming under or through a title derived from him. Rand had Frost's title, as against him, and all

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the world besides, except Frost's creditors. But as to the creditors of the latter, he had no right or title whatever; as against them the conveyance was fraudulent and void, and carried with it no right or title, but it remained in Frost, as it was before. It was the title of Frost, which he had not parted with, as regarded his creditors, and not the title of Rand, which all the parties owning the judgments were endeavoring to reach. The receiver's title came from Frost by a complete and direct conveyance, in pursuance of judicial proceedings and sentence; and, it seems to me, gave to such receiver and to the defendant Selden a lien or title, superior in every respect to any which the plaintiff did or could acquire, by the mere commencement of his action against Rand.

Indeed, I do not see how the plaintiff acquired any lien of any description upon Frost's property, as such, until the commencement of the action against him. Before the code, it was necessary, in order to create a *lis pendens*, to serve the subpoena upon the defendant in the *judgment*. (*Hayden v. Bucklin*, 9 Paige, 512.) The chancellor in that case intimates that a commencement by taking out a subpoena and making a *bona fide* attempt to serve it without delay, which would be a good commencement of the action for the purpose of saving the operation of the statute of limitations, if the action was prosecuted with due diligence, afterwards, would probably be a commencement sufficient to give the complainant in a creditor's bill a preference over a similar action subsequently commenced against the same defendant, in which the subpoena should be first served.

It is to be observed, however, that the law in reference to the commencement of actions is now changed, and that this action was not commenced against Frost for any purpose whatever, until after Frost had parted with his title. As I shall put my decision entirely on this ground, I shall not notice the other points discussed.

The complaint shows a good cause of action, on its face,

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against the defendants Frost and Rand, but none against the defendant Selden, who is entitled to judgment on his demurrer."

Judgment accordingly, and the plaintiff appealed.

*T. B. Strong*, for the appellant.

*H. R. Selden*, defendant, in person.

*By the Court*, E. DARWIN SMITH, J. The demurrer in this case, I think, was rightly disposed of at the special term. The supplemental complaint set up no right of action, as against the defendants Selden and Graves. The plaintiff and Selden are both judgment creditors of the defendant Frost, and are both pursuing their lawful remedies for the collection of their respective judgments from the equitable property of their common judgment debtor. The property of Frost, which both creditors are seeking to reach, is vested in the receiver Graves, and can only be appropriated by him under the order of this court. The receiver, it is true, was appointed upon the application of Selden in the proceedings instituted by him supplemental to execution, but he is as much an officer of the court under such appointment, and under its control, as though he had been appointed in an action, and the plaintiff, upon proper application, is entitled to have the defendant Graves appointed receiver in his suit also. The court does not, in such cases, appoint more than one person receiver of the property of a judgment debtor, however many creditors' bills or proceedings supplementary to execution are instituted against him, as such appointment in one suit or proceeding completely divests the judgment debtor of his title to all his property. The question of priority of lien upon the equitable property of the judgment debtor in the hands of a receiver, which is the only question presented upon this supplemental bill, is not properly, I think, the subject of an action. It can be, and usually is,



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presented and disposed of summarily by the court. (*Boyn-ton v. Rawsen*, 1 *Clarke*, 584.) I can see no necessity or occasion for presenting and litigating this question by action, and I should be disposed to sustain this demurrer upon this sole ground. The defendant Selden has done nothing to interfere with or infringe upon the just rights of the plaintiff—nothing to warrant subjecting him as a party to the plaintiff's suit against Frost and Rand. He has simply asserted his own legal rights, and by superior diligence has obtained the prior appointment of a receiver, in his proceedings. The plaintiff has no ground of complaint on this account, nor any other that I can see, against Selden; and the defendant Graves is merely the receiver. The prior appointment of a receiver does no necessary wrong to the plaintiff. Of itself it settles nothing. It merely preserves and secures the property of Frost for his creditors. But if it were necessary, in disposing of this demurrer, to decide the question which of these parties, the plaintiff or the defendant Selden, had the prior lien upon the property in the hands of the receiver, I should certainly, after the great delay of the plaintiff in prosecuting his action, hesitate long before I concurred in a decision which should deprive the defendant Selden of the benefit of his superior diligence, and give to the plaintiff the fruits of his long and serious litigation to reach the equitable property and assets of Frost, even though I were satisfied that the suit of the plaintiff should be deemed first commenced and a *lis pendens* in respect to such property thereby created. The action was commenced against Rand in December, 1851, and as against Frost, September 12th, 1852. The order upon supplemental proceedings instituted by Selden was made July 17th, 1852; and the order appointing a receiver was made July 19th. On the 6th of August, 1852, the receiver qualified, and on the same day Frost made an assignment to him of his legal and equitable property and interests. Since the defendant Frost put in his answer in this action, on the 4th of October, 1852, it does not appear

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that any proceedings have been had in said suit, till the service of the supplemental complaint making Selden and Graves parties, which was verified July 25th, 1860. Here was an interval of nearly eight years, in which no proceedings were had in the action. In the meantime Selden had diligently prosecuted his suit and proceedings, and had discovered and reached a fund sufficient, probably, to pay his judgments. It would be the height of injustice, now, to let the plaintiff step in and reap the fruit of this litigation, and I am satisfied he has no such right. The commencement of a suit in equity by the service of a summons and injunction upon Frost doubtless created a *lis pendens* and a lien in the nature of an attachment, (*Corning et al. v. White*, 2 Paige, 567,) or a statute execution upon his equitable property. (*Weed v. Pierce*, 9 Cowen, 729. *Beck v. Burdet*, 1 Paige, 309. 4 *id.* 42. 5 *id.* 13. 6 *id.* 445.) But the plaintiff was bound to prosecute his action diligently, to retain his lien, or it would cease, like that of a dormant execution. Chancellor Walworth, in *Edmeston v. Lyde*, (1 Paige's Ch. 637,) says of the creditor in such a case, "if he abandons the pursuit, or lingers by the way, before he has obtained a specific lien, he has no right to complain if another creditor obtains a preference by superior vigilance." The delay of nearly eight years by the plaintiff, in the prosecution of his suit, it seems to me, should be deemed an abandonment or waiver of his prior right, if he had acquired any such right, by the commencement of his suit, as against the defendant Selden. But upon the point whether the plaintiff's suit was first commenced, if it be necessary to decide it now, I concur in the opinion of the judge at special term, that as against the defendant Frost, and so far as a *lis pendens* is concerned, to create any lien upon his equitable property, this suit was not commenced until the service of the subpoena and injunction upon Frost, in September, 1852. He and Rand were not united in interest in any just sense, within the intent and meaning of section 99 of the code. This section declares that an action shall be

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commenced as to such defendant when the summons is served on him, or on a co-defendant who is a joint contractor, or is otherwise united in interest with him. Frost and Rand were not joint contractors, and were in no way united in interest. Rand is a fraudulent grantee of Frost, but he denied his fraud and claimed to be the absolute owner of the property in hostility to Frost and his creditors. I can see no ground on which the complaint can be sustained, and think that the order sustaining the demurrer thereto by the defendants Selden and Graves should be affirmed with costs.

[MONROE GENERAL TERM, September 2, 1861. *Smith, Johnson and Knox*, Justices.]

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## SMITH vs. TIFFANY and PITTS.

If an account is payable in specific articles, upon the demand or request of the creditor, no action will lie upon the same for the recovery of money, nor can such account be used as a set-off, until after a demand and refusal to pay in the specified articles, and in the mode, stipulated in the contract. Where a creditor agrees to receive payment of his debt in lumber at the saw-mill, or in flour, meal &c. at the grist-mill, of the debtor, there is no duty to pay in money, until the creditor has made his election to receive his pay in some of those articles, and has demanded payment accordingly.

The court can review the findings of the jury on the facts, or set aside the same as against the weight of evidence, only when there is no evidence to sustain the verdict, or it is against the clear and decided weight of the evidence.

When the testimony is conflicting, it is the duty of the judge to submit the case to the jury. He will not be justified in taking the case from them and directing a verdict for either party.

**A** PPEAL from an order made at a special term, granting a new trial. The action was brought upon the defendants' promissory note to Elias Clevenger, Brazilla Clevenger and Daniel Thrasher, or bearer, for \$1000, payable on demand, dated October 20, 1858, reduced by indorsements, October 31,

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1858, to \$225.04, allowing interest from date. The plaintiff received it in May, 1859. The defense consisted of two branches: *First*. A payment of \$117.75 to one of the payees, which the verdict allowed. *Second*. A set-off of an account purchased October 10, 1858, by the defendants, of Bickford & Hoffman, against the said payees, on which was due at the time of purchase \$110. After applying this payment, and allowing interest, \$107.29 remained unpaid on the note. The payees were partners, running a saw-mill and grist-mill in Ontario, which they rented of the defendants. The account of Bickford & Hoffman was for materials to repair these mills, furnished in and before March, 1858, amounting to \$125, on which \$13.68 was paid out of the grist-mill, leaving over \$110 due. The jury allowed the payment of \$117.75, but rejected the set-off, and found a verdict for the plaintiff for \$118, the exact balance due on the note, after allowing the \$117.75. The court granted a new trial on the judge's minutes, on the ground that the jury were not authorized by the evidence to reject the Bickford & Hoffman set-off. This appeal was taken by the plaintiff from that order.

*J. Van Voorhis, Jr.*, for the plaintiff.

*J. D. Husbands*, for the defendants.

*By the Court*, E. DARWIN SMITH, J. The plaintiff's right of action is indisputable and undisputed, and the verdict clearly right, unless the jury erred in disallowing the defendants' counter-claim. The defendants purchased a claim of \$125 against the plaintiff's assignor, which they claimed to have allowed as an offset or counter-claim to so much of the plaintiff's demand. Of this amount \$13 was allowed and the residue disallowed. The question in regard to the claim related not to its justice, but to the right of the defendants to maintain any action for the recovery of money on such claim at the time of the commencement of this suit. The question

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litigated in respect to it was whether it was payable absolutely in money or in specific property. In his charge to the jury, the judge advised them that the material inquiry for them was whether there was an arrangement made by the parties, at the time the account was contracted, that the same was to be paid from certain mills. The learned judge also said to the jury that if that was the arrangement between the parties, they (the defendants) must take their pay in that way. The charge then explained more fully the law on the subject, and alluded to the facts, and left it to the jury to decide whether the account was to be paid out of the mills spoken of, and advised them that if not, the demand would be a proper offset against the note. The jury found for the plaintiff and disallowed the set-off; finding, in effect, that the claim was to be paid out of the said mills of Clevenger & Thrasher, the original debtors and the payees of the promissory note in suit in such action. The charge of the judge assumes, what is clearly the law, that if the account was payable in specific articles upon the demand or request of the creditors, no action would lie upon the same for the recovery of money, until after a demand and refusal to pay in the specified articles and mode stipulated in the contract. If the jury believed the witness Thrasher, the account was to be paid out of the mills, being a grist, a flouring and a saw-mill. The substance of the contract was, in this point of view, that the creditor might elect to receive his pay at either mill, in lumber at the saw-mill, or in flour, meal or other articles for sale at the grist-mill. There could be no duty to pay in money until the creditor had made his election to receive payment in some of those articles, and had demanded payment accordingly. This was substantially asserted by the judge to be the law of the case, and no error was committed therein. The question remaining is solely whether the court can review the findings of the jury on the facts, or set aside the same as against the weight of evidence. This can only be done when there is no

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evidence to sustain the verdict, or it is against the clear and decided weight of the evidence. (*Keeler v. Fireman's Ins. Co. of Albany*, 3 Hill, 250. 7 Barb. 271. 27 id 528.) The whole question of fact rested upon the evidence of two witnesses. One testified positively that the debt was contracted upon the express arrangement in regard to its payment claimed by the plaintiff, and the other contradicted such statement. The evidence was thus balanced, and the jury believed the witness Thrasher, who testified to the arrangement affirmatively, instead of the negative testimony of the witness Bickford; and this view of the fact was taken by the judge in his charge. He said to the jury, "One witness for the plaintiff says there was such an arrangement. But Mr. Bickford says there was no such arrangement." Upon this dispute about the facts the circuit judge did right in submitting the case to the jury, and would not have been warranted in taking the case from them and directing a verdict for the defendant allowing the set-off in question. As the case was thus properly and necessarily submitted to the jury, I do not see upon what principle this court can interfere with their verdict. The order granting a new trial, I think, cannot be sustained, and should be reversed and a new trial denied.

[MONROE GENERAL TERM, September 2, 1861. *Smith, Johnson and Knox*, Justices.]

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COLEMAN and wife vs. PLAYSTED and wife.

An action for slander, in charging the plaintiff with having "*stolen* tea, sugar and calico and carried it away," will not be sustained by proof that the defendant alleged the plaintiff "*took* tea and coffee from her [the defendant] and she found them in her things;" or that "she [the plaintiff] had *taken* tea and calico," &c.

The words proved not being actionable *per se*, inasmuch as they do not necessarily impute the commission of a crime, an action can be sustained upon them only by proving that they were uttered with intent to impute a felonious taking of the goods, and were so understood by the hearers.

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Where the judge, in such a case, disregards the variance between the words stated in the complaint and the words proved, and allows the case to go to the jury upon the proofs, on a charge submitting the question of the actual meaning and sense of the words used, this will be equivalent to an amendment of the complaint on the trial, substituting the words proved for those alleged in the complaint.

The court will therefore treat the complaint as amended, or allow it to be amended *nunc pro tunc*, to sustain the verdict.

Where the question submitted to the jury is, what was the meaning and sense of the words proved, as understood at the time, all that was said by the defendant during the same conversation, and in the same connection, is admissible in evidence, for the purpose of giving character to the words spoken, and showing malice.

**A** PPEAL from an order made at a special term, denying a motion for a new trial. The action was brought to recover damages for an alleged slander of the plaintiff's wife, uttered by the wife of the defendant. The slanderous words charged in the complaint were as follows: "I will not have the stinking bitch around my house any more, for I have to keep a lock and key when she is there, to lock up every thing I have, for she has stolen tea, sugar and calico, and carried it away from there, home." Jane Eves testified the defendant said, "she had to lock up every thing in a trunk, to keep people from stealing it; she had thieves in the house; when she had Mr. Coleman's wife there, she took things of hers." On another occasion she said, "she had her to work for her, and she took tea and calico from her, and she found them in her things; she was a thief, and, by G—d, she could prove it." Olive Conklin testified, "she said they could hire Mr. and Mrs. Coleman, but did not want to, because she was such a thief, and such a bad character; she had taken tea and calico, and I think she said sugar;" and she "said she could prove that." At the close of the plaintiff's testimony the defendant moved for a nonsuit, on the ground that the plaintiff had failed to prove any of the words as laid in the complaint. The judge refused to grant the motion, and the defendant excepted. The defendants not offering any evidence, the court charged the jury, and, among other things,

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charged and instructed them, "that they would have a right to take into consideration the fact, that defendant said of the plaintiff she was a 'thief,' if she said so, not for the purpose of giving damages for so saying, but it was a proper piece of evidence when she said taking tea, sugar and calico, to see what idea was meant to be conveyed by the word 'take.'" &c. To which the counsel for the defendant excepted. The jury found a verdict for the plaintiff.

*D. J. Sunderlin*, for the plaintiffs.

*D. B. Prosser*, for the defendants.

*By the Court*, E. DARWIN SMITH, J. The words for the speaking of which this action was brought, as stated in the complaint, are as follows: "She (referring to the plaintiff's wife) *has stolen tea, sugar and calico, and carried it away from there, home.*" These words, as understood in their ordinary sense, impute a larceny, and are actionable *per se*. The words proven on the trial, by one witness, were, "*she took tea and calico from her, and she found them in her things;*" and by another witness, they were, "*she had taken tea and calico, and I think she said sugar.*" Neither of these sets of words are actionable *per se*. To steal tea, sugar or calico, is to commit a larceny. To take either of those articles, is not necessarily to commit a crime. It may mean nothing more than a trespass, and the taking might be entirely innocent. The action therefore clearly was not sustained by the proof of those words. It could only be sustained, upon these words, by proving that they were uttered with intent to impute a felonious taking of the goods, and were so understood by the persons to whom they were addressed, or in whose presence and hearing they were uttered. Before the code, the plaintiff must have been nonsuited for the failure to prove any of the actionable words stated in the complaint. But a more liberal practice now prevails. The judge disregarded the variance in the words, according to



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section 176 of the code, and allowed the case to go to the jury upon the proofs, upon a proper charge submitting the question of the actual meaning and sense of the words used. Disregarding the variance between the words stated in the complaint and the words proved, was equivalent to an amendment of the complaint on the trial, substituting the words proved for those alleged in the complaint. As such an amendment might doubtless have been made on the trial, in the discretion of the judge, and such discretionary order or decision would not be reviewable, we must treat the complaint as amended, or allow it to be now amended *nunc pro tunc*, to sustain the verdict. (*Rayner v. Clark*, 7 Barb. 581. 19 *id.* 371. 20 *id.* 42, 47. 1 *Kern.* 287.) The case was tried upon the theory that the plaintiff might recover if the jury was satisfied that the words proved were intended to impute a felonious taking of the goods. Upon this theory, the exception to the charge that the jury might consider other words used in the same conversation which were actionable *per se*, in giving a construction to the sense and meaning of the words used, is not well taken. It was stated by one witness, that the defendant's wife said of the plaintiff's wife, in the same conversation in which the alleged slanderous words were uttered, "that the plaintiff's wife was a thief, and, by G—d, she could prove it;" and also by another witness, it was proved that the defendant's wife said they could hire Mr. and Mrs. Coleman, but did not want to, because "she was a thief," &c. This also was said in connection with the slanderous words proved, and in the same conversation. In his charge, the judge advised the jury that they had a right to take into consideration these words, not to give damages for them, but to give character to the words spoken. As the question submitted to the jury was what was the meaning and sense of the words proved, as understood at the time, certainly all the conversation of the party at the time was admissible on that point. The words spoken must be construed in the light of the whole of the remarks of the party,

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and all that was said in the same conversation and connection. It is a mistake, I think, that a subsequent action might be maintained for such other actionable words spoken at the *same time*. When there is in substance but *one charge*—and that was in this case the imputation of larceny—it matters not, I think, in how many different forms or phrases of speech the charge is made or repeated in the same conversation; but one action will lie. If a man makes or repeats a slanderous charge, in one conversation, in twenty different forms or phrases of speech, the party slandered could not maintain twenty different actions. He could maintain one action by proof of any of the actionable words, and the residue of the words would be necessarily provable as part of the *res gestæ*, or on the question of malice, but I cannot conceive that more than one action could be maintained in respect to the same slanderous charge. In the case of *Campbell v. Butts*, (3 Comst. 173,) the words given in evidence to show malice, do not appear to have been uttered in the same conversation with the words for which the action was brought, or to have related to the same charge, and must have been uttered at different times; for it is stated that some were spoken before and some after the commencement of the suit. But in this case, I cannot think if the defendant's wife had accused the plaintiff of larceny, in twenty or more different forms of speech, on the same occasion and in the same conversation, that more than one action could be maintained for such slander. It will of course be otherwise if the slanderous words were uttered at different times, and on different occasions. I think, therefore, it was right to give in evidence all that was said by the defendant's wife at the time of the slander, to characterize the words and show malice. And as the case appears to have been fairly tried upon its merits, I think we ought not to disturb the verdict.

New trial denied.

[MONROE GENERAL TERM, September 2, 1861. *Smith, Johnson and Knox*, Justices.]

ROGERS and MARSHALL *vs.* BEARD and others.

Where, in an action upon a bond given for the purpose of procuring the discharge of a vessel attached to enforce a lien for repairs, the defendants seek to recoup the damages sustained by them by reason of the plaintiffs' neglect to perform their contract for repairs within a reasonable time, the true measure of damages is not the probable *profits* of the vessel, but the *rent* or price which would have been paid for the charter, as the vessel was used or chartered at the time.

**A**PPEAL from a judgment entered upon the report of a referee. In the fall of the year 1856 the plaintiffs repaired a schooner belonging to the defendant Beard, and to enforce their lien, seized the vessel under the title of the revised statutes relative to "proceedings for the collection of demands against ships and vessels." (2 *R. S.* 3d ed. 586.) To procure her release, the defendants executed the bond required by the 13th section of that title. This action was brought upon that bond. The cause has been twice tried, before a referee. On the first trial the defendants, under objection, gave evidence of what the vessel would earn each day. The court held the evidence incompetent, and granted a new trial. On the second trial the referee found, as matter of fact, that during the year 1856, Joshua G. Beard, one of the defendants, was the owner of the schooner *Isabella*; that on the 4th of November, 1856, the said schooner was injured by coming in collision with another vessel in a severe storm off the mouth of the Genesee river, in Lake Ontario, and ran into the port of Genesee for repairs; that at first she was taken charge of by an insurance company by whom she had been insured, but subsequently the owner, for the purpose of controlling the matter of repairs, settled with the insurance company and took the control and charge of the vessel; that immediately thereupon, and on the 15th day of November, 1856, the said owner, and the plaintiffs Rogers and Marshall, who were ship carpenters, residing and doing business at Charlotte, made a special contract or agreement, whereby the plaintiffs undertook and agreed to and with said

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Beard to furnish the materials necessary to be used in the repairs of the said vessel, and to do and perform all the work and labor in making such repairs, and finish and complete the same, for the price of three hundred dollars, which Beard in consideration thereof agreed to pay; that no definite time was fixed by the contract for the completion of the work; that the repairs were completed and the work accepted on the 12th day of December, 1856; that with reasonable diligence the work might have been completed by or before the 29th day of November, 1856; that all the work done and materials used by the plaintiffs in repairing the vessel were embraced in the contract, except the blacksmith's bill of \$32.45; that this vessel in the season of 1856, prior to the collision aforesaid, had been used by the owner, who resided in Toronto, Canada West, in navigating Lake Ontario, in carrying produce from Canadian to American ports, and bringing back return cargoes of coal, wood, oats and potatoes to Toronto; the said owner being then engaged in such business. On the question of the damages claimed by the defendants for the delay in the completing the repairs, the following facts were proved, viz: It was proved that during the fall of 1856 there was a large quantity of wheat and other grain at the ports on the Canadian side of Lake Ontario, waiting transportation to American ports, and that there was a great demand for vessels with which to transport the same; that at the close of navigation on the lake, a considerable quantity of wheat and grain remained in store for the want of vessels to transport it as aforesaid; that navigation on the lakes substantially closed about the 22d day of November, 1856, although some vessels continued to navigate the lake, departing from and returning to the Canadian ports after that date. These were, however, exceptional cases. There was no evidence before the referee that any vessel started on a new voyage from any of the American ports after the said 22d of November, except two, and as to them the voyages were broken up by storm and were not com-

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pleted. That in all cases, insurance of ships navigating the lakes with their cargoes for the season expired on the 30th of November, 1856, and all insurances after that time were at special rates, and for particular voyages, and that the uniform rate of insurance, when any could be effected after that date, was at the rate of one per cent per day. Testimony was given, under objection by the plaintiff, (and the referee's decision with assent of counsel was reserved until the close of the case,) tending to prove that the use of the vessel would have been worth to the defendants \$40 per day after the 29th of November to the time the repairs were completed. But this testimony was, according to the referee's view of it, wholly based upon the probable earnings and profits to be derived from navigating Lake Ontario during that period, and without regard to the risks of navigation or the expense of insurance. The same testimony tended to prove that if the property was insured and the expense of insurance deducted from the earnings, no profits would arise to the owners. This testimony the referee disregarded and rejected from consideration in his final decision of the case. It was further proved that the defendants discharged the crew of the vessel, except the captain, before the repairs were commenced, but that the defendants afterwards sent from Toronto to Charlotte another crew of six men to man the vessel, who arrived at Charlotte on the 29th of November, and that this crew remained at Charlotte until the 17th of December, 1856, and then returned to Toronto. The expense incurred was shown in the case. There was evidence tending to prove that the crew were employed during their stay at Charlotte in putting new sails and rigging in the vessel, and that this work was not completed until about the time the repairs were finished. The referee found, however, as a conclusion of law, that the expenses incurred in sending the crew to Charlotte and in maintaining them there, did not constitute any legal claim for damages arising from the said delay. The captain of the vessel remained at Charlotte during the time the repairs to

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the vessel were being made, and superintended the repairs on behalf of the defendants. He was paid by the defendants his wages at \$50 per month during that time, and the defendants also paid \$3 per week for his board while he remained at Charlotte. The referee further found, as a conclusion of law, that this expense constituted no legal claim for damages arising out of the delay aforesaid. That on the 15th of December, 1856, the plaintiffs took proceedings under the provisions of part 3, chapter 8, title 8, of the revised statutes, to enforce their lien for repairs, and a warrant of attachment was issued by Hon. T. R. Strong, a justice of the supreme court, for the seizure of said vessel, as alleged in the complaint; and said vessel was so seized by the sheriff of Monroe county, December 15, 1856, and the same was kept by him until January 28, 1857, when the bond described in the complaint was executed by the defendants, to procure her release, and she was thereupon released and the bond delivered to the plaintiffs. That the plaintiffs paid, at the request of the defendant Beard, the blacksmith bill of \$32.45. The referee further found, that the defendants sustained no damage for the delay of the plaintiffs in completing the repairs pursuant to the contract. The referee further found, as conclusions of law, from the foregoing facts, that at the time of the commencement of said proceedings and the issuing of the warrant of attachment aforesaid, the plaintiffs had a valid lien upon the vessel for the said two sums of \$300, and \$32.45, with interest thereon; and that the plaintiffs were entitled to recover against the defendants, the contract price aforesaid, of \$300, and the sum of \$32.45, paid by the plaintiffs at the request of the defendants, with interest on those two sums from the 14th day of December, 1856.

And the defendants duly filed and served the following exceptions: 1. Wherein the referee finds that the completion of the repairs, 12th December, 1856, was in compliance with the agreement made between Rogers and Beard.

2. Wherein he finds that at the time of the commence-

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ment of the proceedings and the execution of the bond, the plaintiffs had a subsisting lien on said vessel for the sum of \$332.45, and interest on the same from December 12, 1856, and that the plaintiffs are entitled to judgment against the defendants for the penalty of said bond, with execution, for the sum of \$405.45, besides costs.

3. Wherein he finds that no definite time was fixed for completing the repairs and work on the vessel.

4. And wherein he finds that the owner of the vessel was not entitled to any compensation or damage for the detention of said vessel, or for the failure on the part of the plaintiffs to complete such repairs within the time specified, and that no damages were recoverable or allowable.

*J. C. Cochrane*, for the plaintiffs.

*O. H. Palmer*, for the defendants.

*By the Court*, E. DARWIN SMITH, J. The first objection of the defendants' counsel to the plaintiffs' right of recovery in this action, that they had no valid or subsisting lien upon the vessel at the time of its seizure, I think is not well taken. The plaintiffs' claim was for work done and materials furnished for or towards the building, repairing, fitting, furnishing or equipping such ship or vessel. If the plaintiffs establish such debt, it is expressly made, by the statute, a lien upon such ship or vessel, her tackle, apparel and furniture. (2 R. S. 3d ed. 587, § 1.) If the judgment in favor of the plaintiffs is right upon the merits, it necessarily includes and sustains the lien claimed upon the vessel. The work was confessedly done, as the referee finds, upon a special contract for the price of \$300, and the repairs were complete and the work accepted on the 12th December, 1856. The questions in dispute relate chiefly to the time of performance and the counter-claim of the defendants. The referee finds that no definite time was fixed by the contract for the



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completion of the work ; but he also finds that with reasonable diligence the work might have been completed by or before the 29th of November, 1856. The acceptance of the work without objection, after the expiration of the time within which it might have been completed with reasonable diligence, bound the ~~plaintiffs~~ to pay for the same, subject to the right of recoupment or counter-claim for any damages sustained by the non-completion of the work within proper or reasonable time. This finding renders it immaterial whether the referee was right in his finding, upon the facts, that no specific time was fixed by the contract for its completion. If the defendant acquiesced in the delay in completing the work, and accepted the vessel after the time, without objection, he could not afterwards insist that it was not performed in time, as a condition precedent, and refuse payment on that ground ; but he was not cut off from any defense arising from the neglect of the plaintiff to fulfill the contract in time.

The chief question in dispute relates to the defendants' recoupment, or claim for damages, by reason of the plaintiffs' neglect to perform the task within a reasonable time. On this question the referee finds, as matter of *fact*, that the defendant sustained no damages by the delay of the plaintiffs in completing the repairs pursuant to the contract. This finding is necessarily conclusive, and disposes of the whole defense, unless it is so clearly erroneous that we should feel bound to set it aside as against the weight of the evidence. There is a good deal of evidence on this question, and it is quite conflicting, and we clearly, I think, would not be warranted in overruling this finding of the referee, if no error was committed in receiving or rejecting evidence, or in the rule of law applicable to the question of damages in such cases. The whole controversy in the case, and the only real difficulty at the trial, relates to the rule of damages, upon the assumption that the defendants are entitled to recoup. When the case was before us on a former occasion, it appeared that



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the referee had allowed proof showing what the vessel would earn per day. This we held to be error, (*see* 20 *How. Pr. Rep.* 102,) and that the question was what the use of the vessel was worth at that particular season of the year; referring to the case of *Griffin v. Colver*, (16 *N. Y. Rep.* 495,) for the true rule. On the re-trial the defendants' counsel claimed the right, and offered evidence to show what the use of the vessel would have been worth from the 29th November to the close of navigation. This inquiry presented the true question of damages if it sought the value of the charter or rent of such a vessel as such vessel was used or chartered at the time. But the referee regarded the question as presenting simply a speculative opinion, or an inquiry as to probable *profits* of the vessel, depending upon contingencies too uncertain to form a rule of damages. The language employed in the opinion on the former occasion, in respect to the *use* of the vessel, was the same language used in *Freeman v. Clute*, (3 *Barb.* 424,) without particularly considering how such use was to be estimated; but it was intended to assert and follow the rule laid down in *Griffin v. Colver*, (*supra*,) to which reference was had. In this opinion it is held that the *rent* of the property, or the price which would be paid for the charter of a steamboat, referring to the case of *Blanchard v. Ely*, (21 *Wend.* 342,) afforded the true measure of damages in such cases. No wrong was done to the defendants, therefore, by the referee. He received the evidence in the first instance conditionally, and in effect passed upon it as insufficient and not affording the true rule or measure of damages in such cases. The referee, in effect, applied the true rule as laid down in *Griffin v. Colver*, to the evidence offered, and in the light of that case and of the rule there asserted, held that the defendants' evidence was inadmissible, or rather that the defendants, upon such evidence, had not sustained any damages. The referee, we think, applied the right rule in estimating the defendants' damages, and did not err in the

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conclusions of fact in the application of such rule to the defendants' evidence.

No error in substance injurious to the defendants having been committed, the judgment should be affirmed.

[MONROE GENERAL TERM, September 2, 1861. *Smith, Johnson and Knox, Justices.*]

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A trust, in a deed of real estate, to convey the premises to such person or persons as the wife of the grantor shall by writing appoint, is not one of the trusts authorized by law, and is therefore absolutely void.

Where the trustee is not vested with the right to the possession, rents or profits of the land conveyed, for any purpose, either for himself or any other person, the deed of trust will be regarded as void, under the provisions of the revised statutes. (1 R. S. 728, § 49.)

Where an instrument purporting to create a trust in respect to real estate is void upon its face, it will carry its own condemnation with it, and will not be in a proper and legal sense a *cloud* upon the title, which will authorize the interference of a court of equity, to set the instrument aside.

A power to a trustee to hold the premises conveyed, in trust for the grantor's wife, and to convey the same to such person or persons as the latter shall by writing appoint, is a valid power in trust, at the time of its creation and during the life of the *cestui que trust*. And if the act of appointment is exercised by the wife during her life, the power vested in the trustee will become operative, and its execution on his part imperative.

But if the wife dies before her husband, and during the existence of his life estate, without having exercised the power of appointment, the power will cease to exist, and can never thereafter be exerted. Its execution having become impossible, for all practical purposes, the power may thenceforth be regarded as forever extinguished.

In such a case, the estate, having never passed out of the grantor, remains in him. His estate not having been defeated by the execution of the power during his wife's lifetime, it cannot be, after her death; and he will thenceforth hold the property free from any condition whatever.

The existence of a power in trust, valid in itself and once capable of execution but now incapable of execution by reason of the death of the person having the power of appointment, without an exercise of the power, does not present a case fit for the exercise of the equitable power of the court

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to remove a cloud upon the title, by reason of the necessity of resorting to extrinsic evidence to establish the extinguishment of the power.

The objection that the facts stated in the complaint do not present a proper case for the exercise of the equitable power of the court to remove a cloud from the title of the plaintiff, is not an objection to the jurisdiction of the court which must be taken specifically for that cause, under subdivision 1 of section 144 of the code, but it may be taken by demurrer under subdivision 6 of that section, on the ground that the complaint does not state facts sufficient to constitute a cause of action.

**DEMURRER** to complaint. The action was brought to have an alleged trust deed, executed by the plaintiff to the defendant, declared void, and for a decree setting it aside as a cloud upon the plaintiff's title. The complaint alleged that prior to the 27th of October, 1828, and prior to his marriage with Lydia Elting, a sister of the defendant, which took place on that day, the plaintiff was seised in fee of two undivided third parts of a farm of land in the town of Stockport in the county of Columbia, (describing the same.) That on the 29th of October, 1830, the plaintiff executed, acknowledged and delivered to the defendant a *trust deed* (or a paper purporting to be such) of an equal undivided third part of said farm of land, which was recorded in the clerk's office of the county of Columbia on the 1st day of November, 1830. Said deed bears date on the 29th of October, 1830, purports to be given for the consideration of \$30 and divers other good and valuable considerations, and grants and conveys to the defendant said last mentioned premises, and all the plaintiff's right, title and interest therein, *upon trust* that the defendant should hold and retain said premises in trust for the said Lydia, the wife of the plaintiff, subject to the reservations and for the purposes following, viz: 1. The said Hotchkiss reserved to himself for and during his natural life the rents, issues and profits, and the use and occupation and possession of said premises. 2. The said Elting should have and hold said premises in trust for the said Lydia and subject to the above reservations, upon trust to grant, sell and convey the same, subject to said reservations, to such person

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or persons and such parcels thereof, and at such times, as she, whether covert or single, should from time to time limit, direct and appoint by deed or will, or writing in the nature thereof, duly executed. And the deed contained a covenant on the part of Elting (though it was not executed by him) with the said Hotchkiss, well and faithfully to perform, fulfill and execute the said trusts and subject to the reservations aforesaid, and according to the true intent and meaning of the said instrument.

The complaint further alleged that the said Lydia died on or about the 20th of October, 1847, without leaving issue, having never had any children, and without having ever by any deed, will or other writing, limited, directed or appointed the grant, sale or conveyance of said premises or any part thereof, and without ever having executed any will, deed or other writing in relation thereto. The complaint charges that the said deed is void and vested no title or interest in said premises, in the defendant or any other person, and that the plaintiff's title is not divested, but that he has, notwithstanding said instrument, a good and valid title to said premises, and that said deed is a cloud upon the same; that ever since the execution thereof he has been, and still is, in the quiet and peaceable possession of said premises; that the defendant claims to have title thereto, under said instrument, in trust for the heirs at law of the said Lydia, subject only to the plaintiff's life estate; that said last mentioned claim tends to discredit the plaintiff's title, and embarrass him in making sale of said premises. Wherefore he demands judgment that said instrument be declared void and be set aside as a cloud upon the plaintiff's title; and that it be adjudged that neither the defendant nor the heirs at law of said Lydia, nor any other person than the plaintiff, has or have any interest therein or title thereto; and that he may have such further or other relief as may be proper. The defendant demurred to the complaint, and for ground of demurrer specified that

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the complaint did not state facts sufficient to constitute a cause of action against the defendant.

*Darius Peck*, for the plaintiff. I. The want of equitable jurisdiction to grant the relief sought in this case is waived by the demurrer. The only objection specified in the demurrer being the one under the 6th subdivision of section 144 of the code, that the complaint does not state facts sufficient to constitute a cause of action, the objection of want of jurisdiction is waived, under section 148 of the code. The objection of want of jurisdiction is not assigned as a ground of demurrer, and cannot therefore be taken under the present demurrer, specifying as its only ground that the complaint does not state facts sufficient to constitute a cause of action. (*Viburt v. Frost*, 3 *Abbott's Pr. Rep.* 119, 120. *Hobart v. Frost*, 5 *Duer*, 672.) Upon such a demurrer the defendant is deemed, for the purpose of the issue of law made by the parties, not only to have waived any objection to jurisdiction, but to have submitted to the jurisdiction of the court. The legislature intended that the demurrant should distinctly apprise his adversary of the precise question he intended to present to the court, and that the trial of an issue of law should be confined to the very ground of demurrer assigned. Although under section 148 the objection to the jurisdiction of the court is not to be deemed waived by the omission to set it up by demurrer, it does not follow that it can be raised on the argument of a demurrer that assigns a different cause. The demurrer in the case of *Wilson v. The Mayor of N. Y.*, (4 *E. D. Smith's Rep.* 675; *S. C.*, 1 *Abbott*, 4,) like the demurrer in the present case, specified as its only ground that the complaint did not state facts sufficient to constitute a cause of action; and although the question of jurisdiction, under such a demurrer, was entertained and decided by Judge Woodruff at the special term, it was, as he expressly states, because the counsel for both parties concurred in submitting the question of jurisdiction as properly before him under the

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demurrer, strongly doubting his power to entertain the question without such assent. His decision, however, was reversed upon appeal, the court holding that the demurrant could only obtain judgment for the cause specified in the demurrer, and could not raise the question of jurisdiction. (6 *Abbott's Pr. Rep.* 6. 15 *How. Pr. Rep.* 500.)

II. By the deed of trust, neither the trustee nor the *cestui que trust* is entitled to the possession, or authorized to receive the rents and profits of the land, they being expressly reserved to the grantor. The deed therefore, being an express trust, is void, and vests no estate, legal or equitable, in the trustee. (1.) No express trusts can be created except those enumerated in section 55 of the article of the revised statutes, entitled "Of uses and trusts." (1 *R. S.* 728. 3 *id.* 5th ed. 16.) We are to look to this section alone to ascertain the validity or invalidity of an express trust. (*Yates v. Yates*, 9 *Barb.* 324, 340. *Campbell v. Low*, *Id.* 585, 591.) The trust in the present case is not among those enumerated in section 55, and all others being abolished under section 45, it is illegal and void unless capable of execution as a power in trust under section 58, which will hereafter be considered. (2.) The trust is also void under section 49. Nor, construing section 49 in connection with section 47, is this trust turned into a legal estate in Mrs. Hotchkiss, the *cestui que trust*; because by the terms of the trust she had no beneficial interest, nor was she then or thereafter, by virtue of the deed, entitled in law or equity to the actual possession of the land and the receipt of the rents and profits thereof, they being expressly reserved to her husband, the grantor. (*Germond v. Jones*, 2 *Hill*, 569, 574. *Jarvis v. Babcock*, 5 *Barb.* 139.)

III. The trustee having taken no estate in the premises, and the trust not turning into a legal estate in the *cestui que trust*, the same remained in the grantor, precisely as if no deed of trust had been executed. But the trust authorizing the performance of an act lawful under a power is valid only

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as a power in trust under section 58, and the legal estate remains in the grantor subject to the execution of the power. (§ 59.) In this case the trustee is to convey the premises in fee to such person or persons, in such parcels and at such times as Mrs. Hotchkiss should in writing, or by her will legally executed, direct, limit and appoint. The defendant is the grantee of the power, and Mrs. Hotchkiss is the appointee beneficially interested in its execution, answering to the *cestui que trust* in a simple trust. The trustee is not seized of a legal estate in the land, as above shown, but only invested with an authority in relation to its future disposition; and the act so authorized being lawful under a power, the deed becomes valid as a power in trust.

IV. Mrs. Hotchkiss dying without having made an appointment in writing or by will, the execution of the power has become impossible of performance, and is extinguished. This appointment is precisely similar to the requirement of the consent or advice of a third person to the execution of a power, and like every condition must be strictly complied with. If the person whose appointment, consent or advice is necessary, dies before having made or given it in strict conformity with the form prescribed in the power, the power itself is entirely annulled. This has been the long settled rule of the common law, and the statute has nowhere changed, modified or abolished it. (4 *Kent's Com.*, note (a) to p. 333. *Id.* 7th ed. p. 350, and authorities there cited. *Barber v. Cary*, 1 *Kern.* 397, and the authorities cited by *Parker, J.* *Sugden on Powers*, 1 *Am. ed.* 263, 264.)

V. The deed of trust being upon its face valid as a power in trust, and extrinsic facts being necessary to be proved to establish its present invalidity or illegality, equity will interpose to remove the cloud upon the title. Apparent validity and total invalidity in fact which can only be established by parol proof aliunde, by its nature resting in parol, are clear grounds of equitable jurisdiction in this case. To show the present invalidity of this instrument, evidence is necessary to

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prove the extrinsic facts of the death of Mrs. Hotchkiss, and that she died without having made an appointment either by deed, writing or will. This evidence, in the nature of things, rests in parol, and is liable to be lost, or to become obscured. (*New York and New Haven Rail Road Co. v. Schuyler*, 17 *N. Y. Rep.* 592, 599, 600. *Cook v. Newman*, 8 *How. Pr. Rep.* 523, 525. *Van Doren v. Mayor &c. of New York*, 9 *Paige*, 388, 389. 2 *Story's Eq.* § 700.) It is a very old head of equity jurisdiction to interpose and cancel as a cloud upon title an instrument originally valid, but which has by subsequent events become extinguished, *functus officio* or a nullity. (2 *Story's Eq.* § 705.)

*S. L. Magoun*, for the defendant.

HOGEBOM, J. The deed in question does not convey to the defendant any present or future interest in the premises, nor any right to the possession, use or occupation, or the rents, issues or profits thereof, but expressly reserves the latter to the grantor himself during his life. The trust therein mentioned is simply to convey the premises, subject to the reservation, to such person or persons as the wife of the plaintiff should by writing appoint. This is not one of the trusts authorized by law, and is therefore absolutely void. (1 *R. S.* 727, 728, §§ 45, 55. *Yates v. Yates*, 9 *Barb.* 324, 340. *Campbell v. Low*, *Id.* 591. *Jarvis v. Babcock*, 5 *id.* 139. *Voorhees v. Presbyterian Church of Amsterdam*, 17 *id.* 103. *Beekman v. People*, 27 *id.* 273. *McCaughal v. Ryan*, *Id.* 376.) The statute further provides that every disposition of lands, whether by deed or devise, shall be directly to the person in whom the right to the possession and profits shall be intended to be vested, and if made to any person in trust for another, no estate or interest, legal or equitable, shall vest in the trustee. (1 *R. S.* 728, § 49. *Boynton v. Hoyt*, 1 *Denio*, 57. *Rawson v. Lampman*, 1 *Seld.* 456.) In this case the trustee is not vested with the right to the possession, rents



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or profits for any purpose, either for himself or any other person, and the deed must therefore be regarded as void for that reason, also, under the section last named. The deed makes no disposition of the rents and profits during the life of Mrs. Hotchkiss, in case she survives her husband, before exercising her power of appointment; but I think that does not avail to make the deed valid. The deed vests no title to those rents and profits in the defendant. I think not even by implication; imposes upon him no duty whatever, except in a particular contingency; and is a mere attempt to divest the plaintiff's title by a naked *passive* trust. As such trusts were intended to be entirely abolished by the revised statutes, and as no stronger case of a mere passive trust than that presented by this deed can be conceived, except one which imposes no duty whatever upon the trustee in any possible contingency, the instrument in question, so far as it aims to create a trust, must be regarded as inoperative and void.

Such a paper, however, if it be wholly void upon its face, would carry its own condemnation with it, and would not be, in a proper and legal sense, a *cloud* upon the title. (*Mayor of New York v. Meserole*, 26 *Wend.* 136. *Van Doren v. Mayor &c.*, 9 *Paige*, 388. *Cox v. Clift*, 2 *Comst.* 118. *Heywood v. City of Buffalo*, 14 *N. Y. Rep.* 534.) We must therefore see if it be or ever was apparently valid for any purpose, before we can invoke the interposition of a court of equity to set it aside. And it is insisted by the plaintiff that, though void for the purposes of a pure trust, it was, during Mrs. Hotchkiss' life, valid as a power in trust; that is, that it conveyed to the defendant under the form of a trust a *power* to convey lands, which was in itself valid, and under a proper appointment by her would become operative and obligatory upon the grantee of the power.

Section 58 of the article of uses and trusts declares, that where an express trust shall be created for any purpose not therein before specifically enumerated, no estate shall vest in

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the trustees, but the trust, if directing or authorizing an act which may be lawfully performed under a *power*, shall be valid as a power in trust, subject to the provisions of law in regard to powers. (1 *R. S.* 729, § 58.) A power is an authority to do some act in relation to lands which the owner granting the power might himself lawfully perform. (*Id.* 732, § 74.) The power conferred by this deed is a power to convey the farm in question; it is a power which the grantor might lawfully perform, and hence the provision in the instrument in question would seem to have been at its creation a valid power in trust. If the act of appointment had been exercised by Mrs. Hotchkiss during her life, the power vested by the deed in the defendant would have become operative, and its execution on his part imperative; for "every trust power, unless its execution or non-execution is made expressly to depend on the *will* of the grantee, (in this case the defendant is the grantee of the power,) is imperative, and imposes a duty on the grantee." (*Id.* 734, § 96.)

But inasmuch as Mrs. Hotchkiss died before her husband, and during the existence of his life estate, and never in any way exercised her power of appointment, that is, her right to designate to whom the conveyance of the lands should be made by the trustee, or more properly the grantee of the power, the power has ceased to exist, and can never hereafter be exerted. Its execution has become impossible, and for all practical purposes it may be regarded as for the future forever extinguished. (*Barber v. Cary*, 11 *N. Y. Rep.* 402.)

What then becomes of the estate? Having never passed out of the grantor, it remains in him. His estate was liable to be defeated by the execution of the power, but that has never been done, and now never can be. The result therefore is, that Hotchkiss now holds the property disembarrassed of any condition whatsoever.

The only remaining question is, whether this presents a case of equitable cognizance; that is, whether the existence of a power in trust, valid in itself and once capable of exe-

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cution, but now incapable of execution by reason of the death of Mrs. Hotchkiss without an exercise of the power of appointment, presents a case fit for the exercise of the equitable power of the court in removing a cloud upon the title by reason of the necessity of resorting to extrinsic evidence to establish the extinguishment of the power; that is, to prove, 1. The death of Mrs. Hotchkiss; and, 2. The non-exercise of the power of appointment during her life.

The difficulty which presents itself to my mind in entertaining jurisdiction in such a case arises out of the fact, that the deed in question is not in itself void; or if so, is void on its face as attempting to create an illegal trust; but is valid in itself as containing on its face a valid power in trust, which has only become extinguished by the lapse of time, or more properly, by default in the execution of the power. It is not therefore the case of a deed void at the time of its execution by reason of matters patent upon its face, or extrinsic facts then existing, such as fraud or duress. I am not aware that the doctrine of setting aside the instrument as a cloud upon the title has, in any of the modern decisions, been extended to cases where the deed has only become ineffectual by reason of subsequent events not impeaching its original validity, but only destroying its future operation, unless there be some circumstances which bring the case under some of the other heads of chancery jurisdiction; such as discovery, injunction or the like.

The cases which appear in our own state to have gone farthest in support of the doctrine for which the plaintiff contends, are *Hamilton v. Cummings*, (1 *John. Ch. Rep.* 520,) and *Pettit v. Shepherd*, (5 *Paige*, 493.) The first case was a bill filed for the cancellation and surrender of a bond on which the defendant had brought an action at law against the plaintiff, which action was at issue and about to be tried. The plaintiff (in equity) alleged that the bond was executed simply to secure the defendant for becoming bail for the plaintiff's intestate, and that such liability had become ex-

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tinguished. The proof that such was the purpose for which the bond was given was contained in an unsealed receipt executed contemporaneously with the bond. Chancellor Kent held that at law such a paper would not be admissible to contradict the terms of the bond, which was a bond for the payment of money. But that, accompanied by proof that the obligee's liability as bail had become extinguished, and that the bail had never been damnified, it formed an equitable defense to the bond, and justified a resort to an equitable tribunal for relief. In the opinion of the chancellor, there are some dicta tending to support the idea that jurisdiction exists in a court of equity to set aside a deed as a cloud upon the title, whether void on its face or by reason of extrinsic facts, and also when, although originally valid, it has ceased to be any longer effectual by the operation of subsequent events. But this was not the point in judgment; and if it was, the chancellor's position, in part at least, is plainly at variance with the more modern cases, and with what is now regarded as the established law on this subject; to wit, that for defects apparent upon the face of the instrument, equity will not interpose. The case itself may be defended, upon the well established ground of giving effect to a meritorious equitable defense unavailable at law. The case of *Pettit v. Shepherd* (5 Paige, 493) was a bill filed to stay the sale upon execution of the plaintiff's premises, upon a judgment in favor of the defendant against a party from whom the plaintiff had purchased; the judgment being a lien upon the premises as against such party, but not as against a *bona fide* purchaser from such party (which the plaintiff claimed to be) by reason of the lapse of more than *ten years* since the judgment was docketed. The ultimate decision turned on the question of the *bona fide* character of this purchase; which was negatived by the decision of the court. But the doctrine was upheld, that if the purchase had been *bona fide* the suit would have been well brought to restrain by *injunction* a sale, which would have been followed by a *sheriff's*

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*certificate and deed*, which would have been a cloud upon the title. The language of the chancellor is, "And if a court of chancery would have jurisdiction to set aside the sheriff's deed which might be given on a sale, and to order the same to be delivered up and canceled, as forming an improper cloud upon the complainant's title to his farm, it seems to follow, as a necessary consequence, that the court may interpose its aid to prevent such a shade from being cast upon the title, *when the defendant evinces a fixed determination to proceed with the sale.*" (5 Paige, 501.) In the case at bar no such fact appears.

The complaint does not charge any intention on the part of the defendant to convey the premises or disturb the plaintiff's possession, but only with a simple assertion of title on his part in trust for the heirs of Mrs. Hotchkiss—an assertion emphatically contradicted in contemplation of law by the necessary legal effect of the terms of the deed itself. If Elting, under cover of this pretended title, had actually executed a conveyance to a third person, it may be that a suit would lie to set aside the latter deed as a cloud upon the plaintiff's title. It may be, also, that if Elting had threatened to execute a deed, under the pretense of the power thus practically extinct, an injunction would lie to prevent it, and the court thus having jurisdiction of the case might retain it for the purposes of complete justice, and declare the power extinct and the injunction perpetual. The plaintiff is in the undisturbed enjoyment of his property, with abundant means at his command to resist successfully any action of ejectment or other proceeding founded upon the instrument in question, which the defendant may institute against him. If the plaintiff wishes to have the question definitively settled, at once, he can proceed under the statute "to compel the determination of claims to real property in certain cases." (2 R. S. 313.) And he may also preserve the evidence of Elting, as to the non-exercise by Mrs. Hotchkiss of the power of appointment, under the statute, entitled "Of proceedings to

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perpetuate testimony.” (2 R. S. 398.) It is possible that some party may have a conveyance from the grantee of this power under an appointment from Mrs. Hotchkiss. In the present suit, upon this demurrer, it must be taken to be otherwise. But the courts should not lightly set aside an instrument valid in itself—valid at least as a link in the chain of title—which may by possibility be needed by some party not now before the court. No one would think of applying to set aside a will which contained a power of sale to executors for the purpose of paying certain debts or certain legacies, simply because the executors had fully administered the estate, and those debts and those legacies had been fully paid without an exercise of the power. Nor do I suppose an equity suit would lie to set aside a judgment as a cloud upon the title, simply because the judgment had been paid. One reason would be, that the judgment, although paid, might be wanted for the purpose of establishing a necessary link in the title to real estate. Another reason would be, that a perfect defense would always exist at law against any attempt to enforce the judgment. (*Livingston v. Hollenbeck*, 4 Barb. 9. *Van Rensselaer v. Kidd*, Id. 19. *Van Doren v. Mayor &c. of New York*, 9 Paige, 388.)

If a party received a sheriff's deed under a sale upon the satisfied judgment, it is quite possible a suit in equity would lie to set aside such sheriff's deed as a cloud upon the plaintiff's title. (*Heywood v. City of Buffalo*, 14 N. Y. Rep. 541. *Lounsbury v. Purdy*, 18 id. 520. *Ward v. Dewey*, 16 id. 522.)

A suit in equity would scarcely lie to surrender and cancel a paid note—over due—for there would be an ample defense at law. But if the note was negotiable and had not reached its maturity and was about to be transferred to a third party, there might be ground for an injunction and a surrender of the note.

It is suggested, however, that this objection is substantially one of want of jurisdiction, and not having been taken

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specifically for that cause, under subdivision 1 of section 144 of the code, but the objection being under subdivision 6, for a different cause, it cannot now be entertained, on demurrer. (*Code*, §§ 144, 145, 148.) Several cases in the New York common pleas and superior court are cited in support of this position. (*Viburt v. Frost*, 3 *Abbott*, 119. *Hobart v. Frost*, 5 *Duer*, 672. *Wilson v. Mayor &c. of New York*, 1 *Abbott*, 4. 6 *id.* 6.) These cases are not conclusive authority in this court; and if they are intended to apply to a case like the present, I cannot yield my assent to them. The question here is not one of jurisdiction, either of the person or subject matter, but of the legal sufficiency of the matters in the complaint to constitute a cause of action. This court has unquestionably jurisdiction of an action to remove a cloud upon the title to land; and the point is, whether the matters alleged in the complaint are sufficient to constitute a cause of action of that description. It seems to me to come within the very terms of subdivision 6 of section 144, and that a demurrer for that cause is the appropriate one to present the question. If the question were one of jurisdiction, and in its nature incurable, I should have great doubt whether it would not be within the duty and at all events within the power of the court to entertain it by the provisions of § 145, although the demurrer was under subdivision 6 of section 144. If the complaint, on its face, showed a want of jurisdiction, it would necessarily show that the facts therein stated did not constitute a cause of action in favor of the plaintiff against the defendant, in the tribunal in which the suit was brought. Section 145 requires the defendant to specify the grounds of demurrer, and authorizes the court to disregard it, if it does not. But by section 148 the omission to make the specific objection does not *waive* it, and it is difficult to see why the court should refuse to entertain an objection in its nature insuperable, when at a subsequent stage of the action it would be obliged to give effect to it. There are cases, undoubtedly, where an omission to object to the juris-

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diction of the court, in due season, may give the court jurisdiction of the *person* of a party before it; and perhaps the cases cited from the superior court of New York are of that class. To which it may be proper to apply the doctrine that non-objection implies consent, and to refuse to give effect to the objection unless plainly specified in the demurrer. But to a case like the present, where, if I am right, the court would refuse to give the plaintiff relief although he proved every allegation in his complaint, the doctrine is inapplicable. It is, in my opinion, a misnomer to call this an objection to the jurisdiction of the court, in the proper and legal sense of that term. (*See Hillman v. Hillman*, 14 How. 456; *Richards v. Edick*, 17 Barb. 260.)

I am therefore of opinion, without considering the question whether all the necessary parties are before the court—which is not presented on this demurrer—that the demurrer is well taken, and that judgment must be entered for the defendant, thereon, with costs, with leave to the plaintiff to amend his complaint on payment of costs.

[COLUMBIA SPECIAL TERM, September 16, 1861. *Hogeboom*, Justice.]

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OWEN & BELLOWS *vs.* JANE F. CAWLEY and SAMUEL B. CAWLEY.

The power of a married woman to charge her separate estate should not be extended beyond the rule laid down by the court of appeals in *Yale v. Dederer*, (22 N. Y. Rep. 450,) viz. that in order to create a charge, the intention to do so must be declared in the contract itself, or the consideration must be one going to the direct benefit of the estate. *Per* INGRAHAM, J.

A married woman, who had a separate estate, transacted business on her own account, her husband acting as her agent, in conducting the same. The husband employed attorneys to commence suits upon accounts growing out of the wife's business. In an action by the attorneys, against husband and wife, to charge her separate estate with the costs incurred in those suits, there not being enough in the case to show that the husband was in fact, and with the wife's knowledge, acting as her agent in employing the attor-



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neys, and certainly not enough to show that she intended to charge her separate estate, a report of the referee, in favor of the plaintiffs, was set aside, and the case referred back to the referee; the court not being satisfied that all the services rendered were a proper charge on the wife's separate estate. CLERKE, P. J. dissented.

Whether a husband, even though his agency in collecting debts due the wife be admitted, has any right to bind the separate estate of his wife, without her knowledge and express assent? *Quære.* *Per* INGRAHAM, J.

It seems that whether a suit brought in the name of a married woman is or is not for the benefit of her separate estate, must be determined by the intent and object of commencing it, rather than by the result. *Per* GOULD, J. and CLERKE, P. J.

**A**PPEAL from a judgment entered upon the report of a referee. The defendant, Mrs. Cawley, who was a married woman, was the owner of certain real estate, and was engaged in the business of ship chandlery, in the city of New York, which was conducted by her husband as her agent. The property was held by her as her separate estate. Samuel B. Cawley, the husband, as his wife's agent, employed the plaintiffs, who were attorneys, to commence suits upon accounts growing out of the wife's business. Costs being incurred in those suits, the present action was brought by the plaintiffs against husband and wife, to charge her separate estate with the amount of those costs. The action was referred to a referee, who found as facts that the claim was just, and that the services of the plaintiffs were rendered for the benefit of the wife's separate estate; and as matter of law, he found that the plaintiffs were entitled to judgment therefor against such separate estate. From the judgment entered upon the report, Mrs. Cawley appealed.

*D. McMahon*, for the appellant.

*Mr. Owen*, for the respondents.

INGRAHAM, J. I cannot concur in the opinion that all the charges allowed by the referee were properly chargeable on the separate estate of Mrs. Cawley. The decision in *Yale v.*

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*Dederer*, (22 N. Y. Rep. 450,) holds that the intention to charge the separate estate must be stated in the contract itself, or the *consideration* must be one going to the direct benefit of the estate. I am not disposed to extend the rule any further than the court of appeals have laid it down. Applying this rule to the present case, I am at a loss to see how bringing an action for a married woman, which fails, presents a consideration going to the direct benefit of the estate. I suppose the court intended that where the intent to charge the separate estate was not stated in the contract, it might be inferred from a direct benefit to the separate estate. No such inference can be drawn where no benefit, but an injury, results from the service. If there had been but one action, and the married woman had been defeated, with a large bill of costs charged against her, could it in any way be inferred that her separate estate had been benefited by the services rendered?

I forbear commenting upon the fact that the employment was by the husband, and the doubt which might arise whether even though his agency in collecting the accounts was admitted, he had any right to bind the separate estate of the wife without her knowledge and express assent. She could not so charge her real estate, except by her acknowledged deed; and yet in this case the husband, without proof of her knowledge or assent, is allowed to make such a charge, which binds the real and personal estate.

Without, however, expressing any opinion now on this point, I am clearly of the opinion that the defendant is not liable for all the services included in this judgment, and think the report should be set aside and the case referred back to the referee. The present evidence should stand, in the cause, and either party be allowed to produce further testimony.

GOULD, J. While I think that a suit must be judged to be or not to be "for the benefit" of an estate, by the intent

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and object of commencing it, rather than by the result, I am not satisfied that, in this case, the services rendered are a proper charge on the defendant's real estate. All the facts of the case were certainly not in proof before the referee; or else her estate is not chargeable with all these costs. There is not enough in the case to show that the husband was in fact, and with her knowledge, acting as her agent in her employment; certainly not enough to show that she intended any such thing as charging her property.

I am disposed to concur in the result of Judge Ingraham's opinion; and, besides, to hold that the husband is a proper witness to prove his agency, and its extent; as well as all facts concerning the employment of the plaintiffs. The act of 1860, (referring to *what* man and wife, as parties, may testify to,) certainly must mean that the husband or wife may, to *some* matters, be a witness for or against each other. And I can conceive of no case more proper for admitting such testimony than one where either has acted as the agent of the other in the business in controversy. With the *wisdom* of making such a law, we have nothing to do: but unless we allow it to have effect to this extent, we virtually make it of no effect.

I should reverse the judgment, and order a new trial, as suggested by Judge Ingraham.

CLERKE, P. J. (dissenting.) Although a married woman could not have carried on business as a feme sole, previous to 1860, yet the acts of 1848 and 1849 gave her the right to own property, real and personal, in the same manner as if she were unmarried. In this action, the question is not whether Mrs. Cawley or her husband is liable for the debts, or entitled to the profits, of a trading concern; but 1st, whether she possessed separate property, of any kind; and 2d, whether the services, for which the plaintiffs claim compensation, were rendered for the benefit of that separate property.

L. The referee expressly finds that she did own separate

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property; and this is indeed clearly warranted by the admissions of the defendants' answer.

II. In *Yale v. Dederer*, (22 N. Y. Rep. 450,) a majority of the judges concurred in the opinion that the intention to charge the separate estate must be stated in the contract itself, or the consideration must be one going to the direct benefit of the estate. In the present case, we think the consideration went to the direct benefit of the estate. Professional services rendered to recover the claims which constitute the estate, are services directly beneficial to it. The referee has found that the services of the plaintiffs were rendered for the benefit of Mrs. Cawley's separate estate. This was, perhaps, a mixed question of law and fact; but if it was exclusively the former, I am disposed to think that the conclusion at which he arrived was correct. It is no answer to say that some of the proceedings, commenced on behalf of Mrs. Cawley by the plaintiffs, were unsuccessful in the result. If the purpose of those proceedings was to secure claims, which she considered belonged to her, or which were due to her, the commencement or prosecution of these proceedings was as beneficial to her, as similar services would be to any person who was not a married woman. Whoever undertakes, with my consent, to establish my legal rights, undertakes a service for my benefit; and the want of success in the undertaking, unless it was expressly agreed that compensation should depend upon success, would be no excuse for me in refusing compensation. I do not see why such an excuse should be more available in the instance of a married woman, than in that of any other person. The term "benefit" has the same signification in both instances. The faithful and skillful endeavor to serve any one, although not productive of actual profit, is in itself a benefit.

The referee decided correctly in excluding the testimony of the husband. The judgment should be affirmed with costs.

New trial granted.

[NEW YORK GENERAL TERM, September 16, 1861. *Clenks, Ingraham and Gould*, Justices.]

## HOAGLAND vs. BELL.

A judgment against a corporation, as acceptor of a draft, is *prima facie* evidence, in an action against a stockholder, to enforce his individual liability, that the draft was properly drawn and accepted by a duly authorized officer of the company.

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Where the name of an individual appears on the stock book of a corporation as a stockholder, this is presumptive evidence that he is so. And in an action against him as a stockholder, the burthen of proving that he is not a stockholder is thrown upon him.

THIS suit was brought to recover of the defendant, as a stockholder of the "Avon Coal Oil Company," the amount of a judgment recovered by the plaintiff against said company, upon which an execution had been returned unsatisfied. The company was duly organized July 19, 1859, under the general act "to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," and the acts amending the same. The ground alleged for the personal liability of the defendant was, that the capital stock of the company was not at the time of contracting the debt, nor at the time of bringing the suit, fully paid in. This allegation in the complaint was not denied in the answer, and was admitted at the trial. The suit against the company was founded upon a draft, dated August 22, 1859, payable in ninety days, drawn by George R. Clark, superintendent, on J. F. Kendall, treasurer, to the order of the drawer, indorsed by him, and accepted by the company, which draft the plaintiff took, *bona fide*, for full value, before its maturity, of a precedent indorser. The company appeared and put in its answer, which was held sufficient, and judgment was entered for the plaintiff for \$316.53, March 15, 1860. Execution was issued thereon, to the sheriff of the city and county of New York, which was returned wholly unsatisfied. This suit was then brought against the defendant as a stockholder.

The cause was tried before Hon. J. MULLIN, justice, and a jury, November 16, 1860. The plaintiff, for the purpose of showing the defendant to be a stockholder of the company,

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put in evidence the stock or transfer book of the company, which showed that he held stock to the amount of ten shares. The defendant objected to the reception of this evidence. The jury, under direction of the court, found a verdict for the plaintiff. During the trial various points of law were raised by the defendant, which the justice directed to be further argued before him at circuit; which argument was had, and judgment was entered on the verdict in accordance with the direction of the court, for \$412.75. The defendant appealed from the judgment.

*Wm. H. Arnoux*, for the appellant.

*D. A. Hawkins*, for the respondent.

*By the Court*, BARNARD, J. The judgment was *prima facie* evidence that the draft was properly drawn and accepted by a duly authorized officer of the company.

When the judgment roll was offered in evidence, there was no objection on the part of the defendant in regard to the truth of every fact and allegation contained therein, but only that the judgment offered in evidence varied from the one sued on. That variance, as Justice Mullin remarked at the trial, was a slight one, and one entitled to no weight.

The point that the defendant should not be held liable because he was not a stockholder, is untenable. It rarely happens that the stock is in the first instance taken in the name of the owner, but by some one as a representative, and then transferred by assignment. The defendant's name appeared on the stock book as a stockholder, and that was presumptive evidence that he was so. The burthen of proof was thrown then on the defendant. He failed to prove any fact whereby the force of the entry in the transfer book could be overlooked.

The judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, September 16, 1861. *Clerks, Gould and Barnard*, Justices.]

**THE PEOPLE, *ex rel.* Charles W. Baker, *vs.* ROBERT T. HAWS.**

Where the legislature, after having imposed a restriction upon the power of a common council to contract a debt, directs that notwithstanding such restriction a debt contracted in violation of it shall be paid, the court cannot, when the common council is willing to conform to the legislative will, permit one of the officers of the city corporation to set at naught both the will of the legislature and of the common council.

Thus, where a sum of money had, in pursuance of an act of the legislature, been raised by tax, in the city of New York, for, and appropriated by the common council to, the purpose of paying the relator for printing, &c. done for the city, which sum could not be appropriated to any other purpose; *Held* that this was a clear recognition, by the legislature and the common council, of the relator's right to payment, and a direction by both of those bodies that the relator should be paid. And that upon the comptroller's refusal to apply the fund so appropriated, to the payment of the relator's claim, a mandamus was the proper remedy, where it appeared that no action would lie, against the corporation.

**A** PPEAL from an order made at a special term, denying a motion for a mandamus. The application was for a mandamus, to be directed to the defendant, comptroller of the city of New York, commanding him to draw his warrant upon the chamberlain of the city, in favor of the plaintiff, for \$4260, to pay his claim against the city, for certain printing and binding done by him.

—— —, for the appellants.

—— —, for the respondent.

**BARNARD, J.** The appeal papers show that the work in question was done under a resolution passed by the common council and the rate of charge fixed, and the comptroller directed by resolution of the common council to pay the bill.

It seems clear that unless there is some legislative prohibition, or some legislative requirement as to a particular mode in which work should be ordered, the relator is entitled to recover.

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The superior court held that there was such legislative requirement, and therefore dismissed the complaint of relator.

Since that decision, however, the legislature authorized the supervisors of the county of New York to raise by tax the sum of \$4260 for Charles W. Baker, (the relator,) for printing and binding charters with Kent's notes, (being the work in question,) and providing that no portions of the sums of money theretofore or thereafter appropriated by the common council for any specified purpose, should be expended for or applied to any other purposes than those specifically named and provided for in such appropriation.

It must be assumed that the legislature passed this act with knowledge of the circumstances attending the relator's claim and of the decision of the superior court thereon.

By this act the legislature recognized the equity of the relator's claim, and intended to and did provide for its payment, notwithstanding any violation of a previous legislative requirement as to the mode of its contraction.

The legislature first say to the common council, you shall contract no debts except in a particular mode; the legislature afterwards says, although you have not contracted this debt in the mode provided, still we authorize and direct you to pay for it.

If the power that imposes the restriction subsequently directs that notwithstanding such restriction a debt contracted in violation of it shall be paid, the court cannot, when the body who contracted the debt is willing to conform to the legislative will, permit one of the officers of that body to set at naught both the will of the legislature and of the contracting body.

Taking the act of April 17th, 1861, and the ordinance of September 27th, 1861, together, it appears that the sum of \$4260 has been raised by tax for, and appropriated by the common council to, the purpose of paying the relator for the work in question; and that this sum cannot be appropriated to any other purpose.



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This is a clear recognition by the legislature and the common council of the relator's right to payment, and a direction by both those bodies that the relator should be paid. It is not competent for the comptroller, holding in his hands a fund thus specifically appropriated to be paid to the relator, to refuse to dispose of it according to its appropriation.

The order of the special term should be affirmed, with costs.

SUTHERLAND, J. concurred.

CLERKE, P. J. This case is distinguishable from *The People ex rel. Green v. Wood*, (a) in that the relator in the present case had no remedy by action against the corporation; the claim having been decided against him in the superior court. And as the legislature and the common council had made a specific appropriation for that claim, this application comes within the decisions in *The People ex rel. Reynolds v. Flagg*, (16 Barb. 503,) and *The People ex rel. McSpedon & Baker v. Haws*, (21 How. Pr. Rep. 178.)

Order affirmed.

[NEW YORK GENERAL TERM, November 4, 1861. *Clerke, Sutherland and Barnard*, Justices.]

(a) 85 Barb. 658.

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MARIA LINDEN vs. JAMES LINDEN.

In an action by a wife, against her husband, for a divorce, on the ground of cruelty, the defendant denied the allegations of the complaint, and also alleged, as a separate defense, that the plaintiff had a husband, by a former marriage, living at the time of the marriage of the parties, and that the former marriage was then in force. He claimed that the marriage between him and the plaintiff was void, and demanded a divorce in his favor, on that ground. The referee reported that the former husband of the plaintiff was living at the time of the marriage of the parties, and refused to grant any divorce to either party, and directed a judgment against the plaintiff, without costs. *Held* that the report was insufficient as the foundation for a

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judgment in favor of the defendant annulling the marriage between the parties, even upon the default of the plaintiff at the hearing.

Parties asking the intervention of the court for such relief must prove a full and complete case. Nothing is to be taken in favor of the applicant by presumption or intendment, as to the facts, even in the case of a default in answering, or at the hearing. *Per* LEONARD, J.

**A**PPEAL from so much of a judgment entered upon the report of a referee as denied a judgment for a divorce, in favor of the defendant, and from an order made at a special term denying the defendant's motion for leave to enter judgment, upon the report, annulling the marriage between the parties.

*N. Brewster*, for the appellant.

*By the Court*, LEONARD, J. The plaintiff commenced her action for a limited divorce, on the ground of cruelty. The defendant denied the allegations of the complaint, and also alleged, as a separate defense, that the plaintiff had a husband, by a former marriage, living at the time of the marriage of these parties, and that the former marriage was *then* in force. The defendant also claimed that the marriage of the plaintiff and defendant was void, and demanded a divorce in his favor on that ground. The action was referred to a sole referee to hear and decide. He reported that there was no cruelty practiced by the defendant; also, "that the former husband of the plaintiff was living at the time of the marriage of the plaintiff and defendant;" and refused to grant any divorce to either party, and directed judgment against the plaintiff without costs. Prior to entering such judgment, the defendant moved, at special term, on this report, for leave to enter judgment annulling the marriage between the plaintiff and defendant, which was denied.

The defendant has appealed from so much of the judgment entered on the report of the referee as denies a judgment for divorce in his favor; and also from the order denying his said motion.

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There was no appearance for the plaintiff at the hearing of this appeal, and the defendant now asks for the reversal of the said judgment and order to the extent appealed from, and that a decree annulling the marriage contract, on the ground of the former marriage, shall now be entered on the default of the plaintiff.

It is a sufficient answer to the claim for such relief to refer to the omission of the referee to report the evidence, or the fact that there ever was a valid marriage between the plaintiff and a former husband, or that such former marriage was in force at the time of the marriage between the plaintiff and the defendant.

There may have been a divorce from such former marriage; or there may never have existed a valid former marriage; or the subsequent marriage may have been contracted in good faith by the plaintiff while she had reason to believe the former husband dead, or after his absence for more than five years without having been heard of by her. In the latter case, the last marriage could now be annulled from the time only when its "nullity should be pronounced by a court of competent jurisdiction." (3 *R. S.* 5th ed. 227, § 5.)

The report is wholly insufficient as the foundation for the relief demanded. Divorces are not to be encouraged. Parties asking the intervention of the court for such relief must prove a full and complete case. Nothing is to be taken in favor of the applicant by presumption or intendment, as to the facts, even in the case of a default in answering, or at the hearing.

I have purposely omitted to refer to the right of the defendant to the relief demanded as a counter-claim, because I am not prepared to admit the principle insisted on in that respect, and, from the view which has been taken above, the question is not necessarily involved.

Judgment and order appealed from affirmed.

[NEW YORK GENERAL TERM, November 4, 1861. *Sutherland, Welles and Leonard*, Justices.]

IRVIN and others *vs.* CONKLIN and others.

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To enable creditors of a partnership to recover a debt against an individual as a partner, on the ground that he held himself out as a partner, they must prove affirmatively that he did so represent and hold himself out, to *them*, or at least that they were informed of such representations, before the credit was given to the firm.

X A person not a partner, in fact, in a firm, will not make himself liable to creditors, for the debts of the firm, by representing or holding himself out as a partner, unless it appears that the creditors gave credit to the firm, *after* such representation or holding out came to their knowledge.

The ground upon which one holding himself out as a partner is held liable as such, to creditors, is that of estoppel. And it is of the very essence of the estoppel, in such a case, that the creditor trusted the firm with knowledge of the fact that the individual either held himself out, or suffered himself to be held out, as a partner.

If there is no evidence that the creditors knew, at the time the goods were sold to the firm, that an individual had held himself out, or suffered himself to be held out as a partner, the latter will not be estopped from denying his liability as such.

**A** PPEAL by the defendants from a judgment entered upon the report of a referee. The action was brought by the plaintiffs against the defendants to recover the amount of two promissory notes made by said defendants, Henry N. Conklin, Abraham Inslee, David Harrisson and Stephen B. Conklin, under and by their firm or copartnership name of Conklin, Inslee & Co. The defendants all answered the complaint, their answer being a general denial. The cause was referred to a referee, who, on the 29th day of December, 1859, made his report in favor of the plaintiffs and against all the defendants.

*Wm. H. Scott*, for the defendants.

*Thos. Nelson*, for the plaintiffs.

SUTHERLAND, J. The notes upon which this action was brought were made and delivered by Stephen B. Conklin, one of the defendants, in the firm name of Conklin, Inslee &

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Co. The contested question before the referee was, whether the defendant David Harrisson was a member of the firm when the notes were given. The referee, in his first or original report, found as facts, that the sales of the iron by the plaintiffs to the firm of Conklin, Inslee & Co., for which the notes were given, were negotiated through a broker; that before the sales were made, and the notes given, Stephen B. Conklin, one of the firm, represented to the broker that Harrisson was a member of the firm; of which representation the plaintiffs were informed by the broker before the sales; and that the plaintiffs were thereby induced to make the sales and take the notes.

The referee then finds that Harrisson was often at the place of business of Conklin, Inslee & Co. from the time the firm commenced business, in the spring of 1857; and also finds and states, in detail, certain facts and circumstances tending to show that Harrisson held himself out to the world as a member of the firm; these facts and circumstances relating principally to the printing and publishing by the *firm* of business cards and envelopes with the name of the defendant Harrisson on them. The referee then finds that Harrisson did not discountenance the use of these cards and envelopes, or take any steps towards their suppression.

As apparently a conclusion from these facts, the referee finds as a fact, that at the time of the sales of the iron and the giving the notes, the defendant Harrisson was a member of the firm.

In a further or supplemental report, the referee finds that while there was no express testimony that any of the cards or envelopes came to the knowledge of the plaintiffs, he thought it reasonable to infer that they did; and so finds accordingly.

In a still further report, the referee reports that he did not, in deciding the case, consider the representation of Stephen B. Conklin to the broker, that Harrisson was a member of

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the firm, as evidence, except as against the defendant Stephen B. Conklin.

Upon all these reports and findings, I am at a loss to know whether the referee held Harrisson liable on the notes on the ground that he was in fact a member of the firm, when the notes were given, or upon the ground that he held himself out to the plaintiffs as such partner, and was therefore estopped from saying that he was not a partner.

In my opinion, the judgment, as against Harrisson, cannot be sustained on either ground.

To enable the plaintiffs to recover against Harrisson on the ground that he held himself out as a partner, the plaintiffs should have proved, affirmatively, that he did so hold himself out to *them*; at least they should have proved that one of the cards or envelopes, with his name on it, came into their possession, or to their knowledge. There is no such proof; nor does the referee find such to be the fact. He merely finds it reasonable to infer that some of the cards and envelopes did come to the plaintiffs' knowledge before the giving of the notes. This finding is immaterial. Supposition or reasonableness does not prove a fact.

As to the finding of the referee, that Harrisson was in fact a partner, I do not think we can sustain it on the ground that there was a conflict of testimony on that question. There really was no such conflict. Harrisson swore positively that he never was a member of the firm. On the part of the plaintiffs there was no direct evidence that he was a member. It certainly is not necessary to cite authorities to show that the declarations of the other defendants, that he was a partner, were not evidence against him, and could not make him a member of the firm.

There is nothing in the case to show that he was a member of the firm, except the facts and circumstances stated in the referee's report, going to show that he held himself out as a partner; and these circumstances have but little weight, and are not irreconcilable with the truth of Harrisson's oath

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that he was not a partner. There is no evidence that *he* had the business cards with his name on them printed; or that he published or distributed them. The most that the evidence on the part of the plaintiffs amounts to is, that he saw the cards, and did not remonstrate against their use or distribution. He swears that he did remonstrate against this use of his name; and there is other evidence to corroborate him.

Upon the whole, I am of the opinion that the judgment should be reversed, and that there should be a new trial.

MULLIN, J. The only question presented on this appeal is, whether the defendant Harrisson was, as to the plaintiffs in this action, a partner in the firm of Conklin, Inslee & Co.

It is not pretended that he was in fact a partner in the firm; but it is insisted that on the facts proved he was liable to the creditors of the said firm, for its debts, because he suffered himself to be held out as a partner therein.

The evidence from which the referee has drawn the conclusion that Harrisson was liable, is—1st. That he was frequently in the place of business of the firm, and on one occasion declared himself a partner; and 2d. That he suffered cards and envelopes with his name printed thereon, as being a member of said firm, to be circulated by said firm.

I will not take up time in the examination of the evidence in the case. It is only necessary to say that the only act of recognition by Harrisson of his connection with the firm is that on one occasion, when in conversation with the engineer, the latter remarked he would like to have the engine room closed in. Harrisson replied, “*We will have all things right, by and by.*” Harrisson denies that he used any such language, and the referee does not find that H. ever had any such conversation, or that he ever admitted himself to be a member of the firm, except so far as his connection with the printing and circulating the cards and envelopes may establish such a connection.

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The referee has found, upon conflicting evidence, that the cards and envelopes with Harrisson's name on as a member of the firm, were printed and circulated with his knowledge and consent. If these facts make him, in law, liable as a partner in the firm, the judgment is right; otherwise not.

A person is not liable as a partner for representing or holding himself out as a partner in a firm, unless it also appears that the creditor gave credit to the firm after such representation or holding out came to his knowledge. The person thus sought to be constituted a partner is held liable on the ground of estoppel. The law will not permit him to deny his connection with the firm, as to those persons who have trusted the firm after they became informed of his assumed connection therewith. It is of the very essence of the estoppel, in such case, that the creditor trusted the firm with knowledge of the fact that the person sought to be estopped, either held himself out or suffered himself to be held out as a partner. (*Lawrence v. Brown*, 1 *Seld.* 394.)

In *Chitty on Contracts*, p. 243, it is said a mere admission by a person that he is a partner in a firm, is not, it seems, conclusive as to his liability, if made to the contracting party *after* he has contracted with the firm, though a declaration, made *before* that time, would be so.

In *Parsons' Mercantile Law*, p. 167, it is said, "The true rule, we think, (although it may not be quite settled,) is this, that one who thus holds himself out as a partner when he really is not one, is responsible to a creditor who on these grounds believed him to be a partner, but not to one who knew nothing of the facts, or who, knowing them, knew also that this person was not a partner." (*Dickinson v. Valpy*, 10 *B. & C.* 128, 140. *Pott v. Eyton*, 3 *C. B.* 32, 39, and other cases cited in note 3 to *Parsons*, p. 167.)

In *Holcroft v. Hoggins et al.*, (52 *Eng. Com. Law Rep.* 488,) the plaintiff sued to recover compensation for writing certain articles for a newspaper of which the defendants had been proprietors, and whose names as proprietors still ap-



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peared in the stamp office and on the paper itself. The contract was shown to have been in fact made with one Lowthin, after the defendants' interest in the paper had ceased. The defendants were held not liable. Tindal, Ch. J. says: "The evidence was that the contract was made by Lowthin on his own responsibility, and not on that of the defendants. It is true that on the register of the stamp office they held themselves out as proprietors; and if it had been shown that the plaintiff was thereby induced to enter into the contract, they might have been liable. But upon the evidence given, it seems to me the plaintiff is out of court." The other judges concurred, and the rule to show cause why the verdict should not be entered against the defendant was discharged.

In *Pott and others v. Eyton*, (54 Eng. Com. Law Rep. 31,) Eyton, being interested in a colliery, made an arrangement with Jones for opening a shop for supplying the workmen at the colliery. Eyton put up the shop, placed his name over the door, licenses were taken out in his name, and goods purchased and invoiced in his name, and he paid for the same. Eyton received £7, per cent on the sales, for his own use, and the balance of the property went to Jones. It was afterwards arranged that Jones should buy the goods in his own name and Eyton should receive £5, per cent on the sales, and he suffered his name to remain over the door. Jones became indebted to the plaintiffs and others, and this action was brought against Eyton & Jones as partners, to recover such debt. There was no evidence to show that credit was in fact given to Eyton by the creditors, or that they knew that his name had appeared over the door, or in the licenses, or that they ever supposed him to be a partner. Two questions were submitted to the jury: 1st. Whether there was such a sharing of the profits as constituted Eyton an actual partner; and 2d. Whether Eyton had been, by his own permission, held out as a partner, and his credit pledged to the bank. Both were answered in the negative, and a verdict for the defendant. The court, in banc, refused to set it aside.

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These cases are decisive of the one at bar. In this case there is no evidence that the plaintiffs knew, when the iron was sold to Conklin, Inslee & Co., that Harrisson was in the habit of visiting their office; or that he had had the conversation testified to by the engineer; or that he knew of, or assented to, the printing and circulation of the cards and envelopes. Without this proof, Harrisson is not estopped from denying his liability; and without it, he is not liable for the debts of the firm.

I am quite clear that the referee has erred in holding Harrisson liable as a partner; and that the judgment should be set aside and a new trial had before another referee.

CLERKE, P. J. concurred.

New trial granted.

[NEW YORK GENERAL TERM, November 4, 1861. *Clerke, Sutherland and Mullin*, Justices.]

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GILE vs. LIBBY & WHITNEY.

Innkeepers are answerable for the honesty, not only of their servants, but of their guests.

In an action against innkeepers, by a guest, to recover the value of property lost by the latter, proof of the loss or larceny of the goods from the room occupied by the guest, is alone sufficient proof of carelessness on the part of the defendants.

What will amount to carelessness on the part of a guest, which will excuse the innkeeper.

The act of April 18, 1855, to regulate the liability of hotel keepers, was intended to exempt keepers of hotels from liability as to certain property or kinds of goods specified in it, in certain cases, or under certain circumstances, and not to alter or affect the principle or policy upon which their liability was established, or the nature of the contract or duty upon which it was enforced, at common law.

The exemption of the hotel keeper from liability for the loss of the articles mentioned in the first section of that act, was intended to apply only to such an amount of money, and to jewels, ornaments or valuables, as the

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landlord himself, if a prudent person, and traveling, would put in a safe, if convenient, on retiring at night.

A watch and chain, and a gold pen and pencil case, are articles not within the meaning or intent of that section, but should be considered a part of the guest's personal clothing or apparel; and the liability of the hotel keeper for their loss is to be determined by the common law rule in such cases.

Where the circumstances render it probable that the goods of a guest are stolen from his room by a fellow lodger, with whom he is placed, notwithstanding his remonstrances, the fact of his neglecting to bolt the door of his room on retiring, as required to do by a notice, posted in the room, under the second section of the act of 1855, will not avail the hotel keeper as a defense to an action to recover the value of the goods stolen.

THIS was an action brought to recover from the defendants, as innkeepers, the value of a watch and chain, a gold pen and pencil case and \$25 in money. The plaintiff was a guest at the defendants' hotel in the city of New York, July 7th, 1856. He was put to lodge, late at night, in a room occupied by another person, who was a stranger to him. He did not request to be put in a separate room, and made no objection to lodging in that room except to the porter, who showed him to it, after he arrived in it. It was a usual thing at said hotel for more than one person to occupy the same room. On retiring he turned the key in the lock, but was not sure he locked the door. He did not bolt the door, though there was a bolt for that purpose, and although a notice was posted in a conspicuous place in the room requesting him to do so. He hung his watch on a hook in a conspicuous place, and his pantaloons, containing his money, &c. upon another such hook. When he awoke, his fellow lodger had risen and departed, leaving the door open, and his watch, money, &c. were missing. A printed notice, pursuant to the law of 1855, to regulate the liability of hotel keepers, was posted in a conspicuous place in the room. The referee found as facts, the posting of the notice; that the goods were stolen from the room in which the plaintiff lodged; and as conclusions of law, that there was no negligence on the part of the plaintiff, but that the loss was occasioned by the negligence of the defendants, and that the plaintiff was entitled

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to recover. To which conclusions of law the defendants excepted; and they appealed from the judgment.

*John Owen*, for the appellants. I. There being no actual negligence on the part of the defendants, and a recovery being claimed against them solely on the ground of their common law liability, to entitle the plaintiff to recover, he should have shown affirmatively that he was guiltless of any negligence which proximately contributed to the loss. (*Button v. Hudson River R. R. Co.*, 18 *N. Y. Rep.* 248.) Any other rule would open the door to the grossest injustice against innkeepers, carriers, and all persons on whom the law imposes such extraordinary responsibility. This being the rule, the referee should have granted the nonsuit on the application of the defendants, more especially as the plaintiff's own evidence showed clearly a want of common prudence, indeed a great degree of recklessness, if not a clear design to sustain the loss, and look to the innkeepers for his indemnity.

II. Negligence, being a mixed question of law and of fact, is established by evidence tending to show a want of ordinary prudence, and therefore the exclusion of the evidence offered by the defendants was error. (3 *Gr. & W. on New Trials*, 1345, and cases cited. *Foot v. Wiswall*, 14 *John. Rep.* 303.)

III. If the negligence of the plaintiff has contributed in any manner to the loss, he cannot recover. (*Purvis v. Coleman*, 21 *N. Y. Rep.* 111, and cases there cited. *Angell on Carriers*, § 556, and cases cited. *Button v. Hudson River R. R.*, *supra*; see page 259, opinion of *Harris, J.*)

IV. It is enough to exonerate the innkeeper, if the guest has by his own neglect or imprudence exposed his goods to peril. (*Fowler v. Dorlan*, 24 *Barb.* 388.)

V. The notice required by the law of 1855 being posted in the room occupied by the plaintiff, he could not recover for any articles covered by that law.

VI. The plaintiff having disregarded the notice posted in

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his room, "to bolt his door upon retiring," which was a reasonable request, cannot claim that he was guiltless of negligence. This rule seems to be established as not in conflict with the rule that a carrier, &c. cannot limit his liability by a mere notice, as decided in *Dorr v. New Jersey S. N. Co.*, (1 Kern. 485. See certain English cases cited with approbation in *Purvis v. Coleman*, above.)

*Beebe, Dean & Donohue*, for the respondent. I. The act of 1855 does not alter the common law liability of innkeepers as to the ordinary wearing apparel and other articles used by a guest, and which are not usually placed by prudent men in a safe for safe keeping. The place which is to be provided is a "safe" for the "safe keeping of money, jewels and ornaments," in which they are to be "deposited." This was never intended to reach a watch worn for use, a pencil, or money necessary for traveling expenses, more than wearing apparel. The only rule for the construction of an act is the intent of the legislature that passed it. (*Sedg. on Stat. and Const. Law*, 231. *Furman v. New York*, 5 Sandf. 10. 8 Lond. Jur. 795. *Johnson v. Bush*, 3 Barb. S. C. Rep. 207, 238. *Young v. Dake*, 1 Seld. 463. *Tonnele v. Hall*, 4 Comst. 140. *People v. Utica Ins. Co.*, 15 John. 358, 380.) The means to be employed in the construction is to consider, 1. What was the common law? 2. What was the mischief? 3. What the remedy? 4. What the reason of the remedy? (*Sedg.* 235.) Money necessary for traveling expenses is baggage. (4 Duer, 119. 9 Wend. 85. 6 Hill, 586. 4 E. D. Smith, 178.)

II. The defendants were liable at common law, without proof of negligence. The statute certainly does not take away the legal liability resulting from actual negligence. (*McDonald v. Edgerton*, 5 Barb. 560, 564. *Bennet v. Mellor*, 5 T. R. 273. 2 Kent's Com. 594.) The defendants, by placing the plaintiff in the room with a stranger to him, guaranteed the honesty of the latter. By placing him thus, they

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agreed to guard the door in case the other guest left it open. (*Jones on Bailm.* 95, 96. *Ewd. on Bailm.* 399, 401.)

III. The referee having as matter of fact found that the defendants were negligent, the court will not reverse the judgment.

SUTHERLAND, P. J. The liability of an innkeeper by custom, or the common law, for the loss of the goods of his guest, would appear to have been founded on contract—on the implied undertaking on the part of the innkeeper to safely keep the goods, in consideration of the usual charge to be paid by the guest for his lodging and entertainment. The action might be either assumpsit or case. In either action it was usual, and perhaps necessary, to allege in the declaration that the loss occurred by and through the carelessness of the innkeeper and his servants.

The innkeeper was bound to take more than ordinary care; he was answerable if the goods were stolen by his servants, or by any other persons, without any fault of himself or of his servants. (*Jones on Bailm.* 95, 96. *Grinnell v. Cook*, 3 *Hill*, 488.)

At the trial, the plaintiff had to prove in the first instance, only, that he was received into the defendant's inn or hotel as a guest or traveler; that he brought with him into the inn or hotel certain baggage or goods of his, and that the baggage or goods were lost or stolen whilst in the inn or hotel. If the allegation of carelessness on the part of the defendant was a necessary allegation, proof of the loss alone sufficiently established it in the first instance; for the liability of the innkeeper was an extraordinary liability, and made him, in fact, an insurer of the safe keeping of the goods. The defendant, of course, could prove on his part, that the plaintiff himself caused or materially contributed to the loss or larceny; and if the defendant proved this, the plaintiff could not recover, for he could not take advantage of his own wrong.

In this case the complaint not only alleges that the goods

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were stolen or lost by the carelessness of the defendants, but also (probably unnecessarily and improperly) certain facts or circumstances as evidence of such carelessness; that the defendants placed the plaintiff to sleep in a room occupied by another person, and which was not securely fastened. The answer denies that the loss was occasioned by the carelessness of the defendants, but says it was by the carelessness of the plaintiff, and sets up the further defense under the act of 1855, (chapter 421,) that the defendants had provided a safe, and had given notice thereof, by posting, &c. as required by the act.

The referee finds that the loss was occasioned by the carelessness of the defendants, and that there was no negligence on the part of the plaintiff. There does not appear to have been any exception to these findings, but if there was, they are clearly right, and must be deemed conclusive on the question of carelessness. The plaintiff proved the loss or larceny of the goods from the room in which he lodged, and there is nothing in the case to impeach or contradict him. This alone was sufficient proof of carelessness on the part of the defendants.

The plaintiff, when he went to bed, turned the key in the door to lock it, but did not know that he locked it. His money was in his pantaloons pocket, and they were hung on a hook, and his watch on a nail. There was a bolt on the inside of the door. The plaintiff testifies that he did not see it. When he arose, the door was open or ajar, and his fellow lodger gone. These were all the circumstances proved to show carelessness on the part of the plaintiff. Surely they do not show it. I am not certain, independent of the act of 1855, that the plaintiff was obliged even to lock or bolt the door, to hold the defendants responsible for his loss. They were answerable for the honesty, not only of their servants, but of their guests.

The only remaining, and the material question in the case, then, is as to the construction of the act of 1855, (chapter

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421;) whether that act exempted the defendants from liability in this case. I think the referee was right in holding that it did not. The act was intended to exempt hotel keepers from liability as to certain property or kinds of goods specified in it, in certain cases, or under certain circumstances, and not to alter or affect the principle or policy upon which their extraordinary liability was established, or the nature of the contract or duty upon which it was enforced, at common law.

The substance of the first section of the act is, that the hotel keeper shall not be liable for loss of money, jewels, ornaments or valuables, when he shall have provided a safe in the office of the hotel, or other convenient place, for the safe keeping of such property, and shall have posted a notice to that effect in the room occupied by the guest, and the guest shall have neglected to deposit such property in the safe.

In this case the plaintiff lost his watch, with chain attached, a gold pen and pencil case, and twenty-five dollars in money. The referee found that the amount of money lost was such a sum as was reasonable and necessary for the plaintiff's traveling expenses.

In construing the first section of the act, we must look at the whole of it. Doing so, I think it plain that the exemption was intended to apply only to such an amount of money, and to such jewels, ornaments or valuables as the landlord or hotel keeper himself, if a prudent person and traveling, would put in a safe, if convenient, when retiring at night. Can any one suppose that it was the intention of the act to exempt the hotel proprietor from his common law liability, unless the traveler emptied his pockets of every cent of money, and deposited it, with his watch and pencil case, in the safe, both of which last mentioned articles he might have occasion to use after retiring to his room? This would be not only exempting hotel keepers from their common law extraordinary liability, but requiring extraordinary prudence of their guests.



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Do hotel keepers themselves, on retiring at night, take out of their pockets such a sum of money as twenty-five dollars, and their watches and pencil cases, and deposit such money and articles in their own safes? If they should do so, I think such extraordinary prudence would attract attention.

To give the act a reasonable construction, and to determine what sum of money and what articles of jewelry, or of ornament, or what valuables are within it, under the circumstances of the case, reference must be had to the ordinary use of safes, and the ordinary purpose in providing and keeping them. In my opinion, at this day, the traveler putting up at a respectable hotel, who, on retiring at night, should think of taking from his pocket and depositing in a safe such a sum as twenty-five dollars only, or his watch and gold pen and pencil case, would be considered not only extraordinarily but ridiculously prudent.

The watch and pen and pencil case are certainly valuables, and perhaps might be called jewels, but I think should be considered a part of the traveler's personal clothing or apparel. The legislature certainly did not expect the traveler, after retiring, to send down his ordinary clothing or apparel to be deposited in the safe.

The substance of the second section of the act of 1855 is, that when the proprietor of a hotel shall post, in a conspicuous manner, in the room occupied by a guest, a notice requiring him to bolt the door of his room, or on leaving his room to lock the door and leave the key with the clerk at the office, and if the guest shall neglect so to do, the proprietor shall not be liable for any baggage of the guest which may be lost or stolen from the room. It was shown in this case that there was both a bolt and a lock on the door of the room. The plaintiff turned the key in the door, and intended to lock it. He says he did not see the bolt, and there is no evidence that the door was bolted. The notices contemplated by both sections of the act were posted on the door of the room.

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Assuming that the plaintiff did not bolt the door on retiring, the defendants could not avail themselves of that fact as a defense in this case.

I. Because it is not set up in the answer.

II. Because the money and articles lost were not probably baggage, within the meaning of the second section of the act; and,

III. Because, under the circumstances, and in the absence of any proof to the contrary, it must be deemed probable that the property was taken by the fellow lodger of the plaintiff, and that both bolting and locking the door would not have prevented the loss.

Besides, it appears that the plaintiff remonstrated with the servant of the defendants, who conducted him to his room, against being put in a room with another person.

The judgment should be affirmed, with costs.

LEONARD, J. In my opinion, the articles stolen were not within the meaning or intent of the first section of the act of 1855. The act, therefore, constitutes no defense here.

The amount, and the circumstances of the case, take the money out of the operation of the act. The liability of the defendants is to be determined by the common law rule in such cases.

I am for affirming the judgment with costs.

WELLES, J. concurred.

Judgment affirmed.

[NEW YORK GENERAL TERM, November 4, 1861. *Sutherland, Welles and Leonard*, Justices.]

THOMPSON, administrator, &c. vs. THE TIOGA RAIL ROAD  
COMPANY.

The statute of limitations does not operate as a bar to an action in the courts of New York, against a foreign corporation.

Such a corporation is within the exception to the operation of the statute, by which the time of absence from the state is not to be taken as any part of the time limited for the commencement of an action.

Where drafts were drawn by W., the president of a corporation, and signed with his own name, with the addition of "Prest. T. N. Co.," and it was proved that he drew the drafts in his capacity of president, for the benefit of the company; that the company received the proceeds; and that it subsequently recognized its liability by giving its bond as collateral; *Held* that the evidence showed that the signature of W. was official, and not private, and rendered the drafts the drafts of the company, within the cases of *Babcock v. Beman*, (11 N. Y. Rep. 200,) and *The Bank of Genesee v. The Patchin Bank*, (19 id. 312.)

THIS suit was brought to recover the amount due upon three several bills of exchange, drawn by the Tioga Navigation Company. The bills were signed by James R. Wilson as "Prest. T. N. Co." They were all dated June 1st, 1840. Two of them were for \$5000, and one of them for \$4000. Each bill was dishonored and duly protested. The name of *The Tioga Navigation Company*, the drawers, which was a corporation existing under the laws of Pennsylvania, was, by a special act of the legislature of that state, changed to that of *The Tioga Rail Road Company*, against which company this suit is brought. The answer set up, among other things, 1. That the action was barred by the New York statute of limitations; 2. That the drafts were the individual drafts of Wilson, by whom they were signed; and 3. That Wilson, by whom the bills were drawn, had no power to bind the defendants. Wilson was the president of that corporation, at the date of the drafts. In his capacity as such, he drew the drafts for the company, and the company received the avails of the drafts. Subsequently, the Tioga Navigation Company itself recognized its liability upon these drafts, by giving its own bond as collateral to the notes which Messrs.

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Gulich, Saynisch and Bostwick had given to Abraham G. Thompson, to secure the payment of these very drafts.

The case was tried at the circuit, before Mr. Justice INGRAM and a jury, when the court ordered a nonsuit, and judgment for the defendants was entered accordingly. The plaintiff appealed.

*E. P. Cowles*, for the appellant.

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*By the Court*, CLERKE, P. J. I. The case of *Olcott v. The Tioga Rail Road Company*, (20 N. Y. Rep. 210,) conclusively settles that our statute of limitations does not operate as a bar to this action.

II. In *Babcock v. Beman*, (1 Kern. 200,) the defendant indorsed the note, upon which the action was brought, by writing his name upon it and adding the word "Treasurer," and the note itself was payable to him with the addition of the usual abbreviation of the word. The drafts in the case under consideration were signed by James R. Wilson, with the addition of the abbreviated words, "Prest. T. N. Co." They were made payable to his order, and were indorsed by him. The instruments in both cases, in form and substance, were similar, so far as the personal liability of the indorser in the one case, and the drawer in the other, was concerned. The extrinsic facts, also, in the case before us, are analogous to those in *Babcock v. Beman*, and to those in the *Bank of Genesee v. Patchin Bank*, (19 N. Y. Rep. 312.) The instruments purport, on their face, with sufficient clearness, to be the drafts of the company. It was proved at the trial that Wilson was, at the time, president of the corporation; that in his capacity as such he drew the drafts for the benefit of the company; that the company received the proceeds; and that subsequently they recognized their liability by their own bond as collateral to the notes, which Messrs. Gulich,

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Saynisch and Bostwick had given to secure the payment of these drafts. The evidence, then, unquestionably shows that the signature of Wilson was official and not private, and brings this case within the essential principles of the cases to which I have already referred.

III. The company had power to borrow money to defray its expenses and pay its debts, and it ratified the authority of its agent by receiving the proceeds of the drafts and appropriating the money to the payment of its debts and expenses.

The judgment should be reversed, and a new trial ordered; costs to abide the event.

[NEW YORK GENERAL TERM, November 4, 1861. *Clerke, Sutherland and Allen, Justices.*]

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 BUCKINGHAM and others, survivors, &c. vs. PAYNE.

Where creditors receive from their debtor the note of a third person, for collection, the proceeds to be applied upon the debt of such debtor, they will be deemed to have assumed the obligation of an attorney or agent for the collection of the demand.

They are bound to use ordinary diligence, in the collection of the note, and are responsible for ordinary neglect. Negligence, in such a case, is a question of fact.

They cannot be held liable for the amount of the note, except upon a distinct finding by the referee, as a matter of fact, that the loss of the sum due upon the note was owing to, or consequent upon, their negligence.

In reviewing a judgment rendered by a referee the court acts simply as an appellate tribunal, and must reverse a judgment not warranted by appropriate findings on the questions of fact, if the proper exception is taken.

The facts found by the referee must sustain his findings upon the law, and the law of the case must be predicated upon such findings of fact.

THIS was an appeal from a judgment entered upon the report of a referee. The action was brought by the plaintiffs, as survivors of Philo Buckingham, who, with them,

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composed the firm of P. Buckingham & Co., at Toledo, Ohio. The object of the suit was to collect a balance due to the firm, from the defendant, for advances made on produce shipped to them by him, to be sold. The defendant, in his answer, denied all indebtedness, alleged payment, and for a third defense, stated that on or about the 10th day of January, 1854, the firm of P. Buckingham & Co. made and entered into an agreement with the defendant, by which they, said P. Buckingham & Co., were to take of the defendant two notes of John Davenport, amounting to the sum of \$1042.81, and one note of Jonathan G. Waite, amounting to the sum of \$1036.91, and credit the same on the account of said P. Buckingham & Co. against the defendant; that on the 22d January, 1854, the defendant forwarded and delivered said notes to P. Buckingham & Co., which notes were received by them on or before the 9th day of February, 1854, and which it was the duty of said P. Buckingham & Co. to apply upon said account according to said agreement; that they have never returned said notes to the defendant, or either of them; *that said notes were all good and collectable, and that the defendant would prove this agreement and the delivery of said notes in pursuance thereof, by way of counter-claim to the demand of the plaintiffs as such survivors.* The defendant, for a fourth defense, alleged that on or about the 10th January, 1854, the said P. Buckingham & Co. made and entered into an agreement with him, by which they were to receive from the defendant a note made by Jonathan G. Waite, upon which there was due on the 22d January, 1854, the sum of \$1036.91, and two notes made by one John Davenport, on which there was due and unpaid on the day last aforesaid, \$1042.81, and were to collect said notes forthwith, and apply the proceeds upon this said demand against the defendant; that on or about the 22d January, 1854, the defendant forwarded said notes to said P. Buckingham & Co., which were received by them *in pursuance of the agreement aforesaid* on or before the 9th February, 1854; that said

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notes and each and every one of them were good and collectable when received by the said P. Buckingham & Co; *that they neglected and refused to take steps to collect the same, and entered into an agreement with said Waite to extend the time of payment of his said note, as the defendant had learned and believed*, which was done without the knowledge or consent of the defendant; that they still held or had the control of said notes or the proceeds thereof, and had never returned or offered to return the same or either of them to the defendant, whereby the defendant had wholly lost said notes; that by reason of the neglect and refusal of the said P. Buckingham & Co. to comply with the said agreement on their part by collecting said notes, and each and every of them, as they were bound to do, the defendant had sustained damages to a large amount, that is to say, to at least the amount of \$1036.91, with interest from the 22d January, 1854; which damages the defendant would prove and set up on the trial by way of counter-claim to the demand of the plaintiffs as such survivors, and would demand judgment therefor in his favor.

The referee reported as follows: That before the month of November, 1853, the defendant was indebted to the plaintiffs to that extent that if no payment had been made thereon, the amount of the balance of said indebtedness would, on the 26th day of September, 1855, have been \$971.87; that in December, 1853, the plaintiffs, by their agent, called upon the defendant for payment of his indebtedness, and it was then agreed that the defendant should place three notes in the plaintiffs' hands to be collected, and the avails placed to his credit in account, and that for the balance of that indebtedness, over and above the amount supposed to be due on the notes, he was to make payment in cash at the rate of \$100 per month; that on or about the 22d day of January, 1854, the defendant, who resided at Farmington, Ontario county, N. Y., inclosed by mail to the plaintiffs, who did business at Toledo, Ohio, three notes, two made by one Davenport, which

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were afterwards paid and applied on account, and one against Jonathan G. Waite for \$1982, dated 18th May, 1853, at ninety days, to the order of Benjamin Fairchild, at the American Exchange Bank, New York, with interest, indorsed by said Fairchild, but not protested for non-payment, and indorsed after maturity by the defendant. Several payments had been made on this note, all of which had been paid before it was placed in the hands of the plaintiffs. Waite also held an offset against the note at that time of \$272.04; the note had also been garnisheed under the laws of the state of Michigan, (Waite residing at Sturges in that state,) for the sum of \$300, the suit on which was pending August 27, 1853; the plaintiffs acknowledged the receipt of the notes by letter dated 9th February, 1854, and informed the defendant that Waite said he would pay on the 15th May, 1854, to which the defendant made no reply. The plaintiffs called on Waite for payment, which was not made, and the plaintiffs placed the note in the hands of an attorney at law in the early part of 1854, with directions to use his best judgment in obtaining the money by suit or otherwise; through this attorney they received from Waite on the note, by a judgment against one Bacon, \$297, September 9th, 1855, (of which they credit the defendant, 17th August, 1855, \$100, and 27th September, 1855, \$100,) which is all that has been paid by the said Waite on the note. In September, 1855, (September 25th, 1855,) judgment was confessed by Waite on the note in favor of Benjamin H. Buckingham, one of the plaintiffs in this action, for \$1066.52, upon which nothing has ever been collected, no action was ever commenced by the plaintiffs against Waite on the note, nor any attempt made to collect the same by process of law before the 12th September, 1855; before October, 1854, a demand as large as this note could have been collected of him by judgment and execution. The referee further found, that there was unpaid on the indebtedness of the defendant to the plaintiffs, at the date of his report, the sum of \$971.87, and interest thereon from



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26th September, 1855. And that there was due and unpaid on the note of the said Waite the sum of \$1035.29, and interest from 26th September, 1855. And he found, as conclusions of law, that the transfer of the note of Waite was not a payment by the defendant to the plaintiffs; that the plaintiffs undertook the collection of the note by means of legal process if need be, and to apply the avails of it when collected; that they were not liable for any failure in this undertaking until after 15th May, 1854; that they were liable for a neglect to collect after that day; that they did so neglect, and that the defendant sustained damage thereby to the sum of the uncollected balance thereof, to wit, \$1035.29, on the 26th September, 1855. And he adjudged that the defendant have judgment against the plaintiffs for the sum of \$63.42 and interest thereon from 26th September, 1855, and his costs.

*Wm. H. Greene*, for the appellant.

*James C. Smith*, for the respondent.

*By the Court*, E. DARWIN SMITH, J. In receiving the note of Waite for collection, the proceeds to be applied upon the defendant's debt, the plaintiffs must be deemed, under the facts found by the referee in this case, to have assumed at least the obligation, whether resting in duty or upon contract implied by law, of an attorney or agent for the collection of the demand. They were bound to use ordinary diligence in the collection of the note, and are responsible for ordinary neglect. Such was the rule as laid down in the case of *Hoard v. Garner*, (6 *Selden*, 261,) where the defendant had covenanted to take proper means to collect the amount due and secured to be paid by the mortgage assigned. On the trial of that case, the judge charged the jury that the defendant "was bound to use reasonable diligence in the institution and prosecution of the proceedings necessary to col-

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lect the amount due and secured to be paid by the mortgage," and was liable for unreasonable delay in the commencement of such suit while the negligence was his own or that of his attorney. This ruling was affirmed by the superior court of New York, and by the court of appeals. Such was the rule laid down in the case of *Ex parte Mure*, (2 Cox, 76,) which was a case where the creditor received for collection, by assignment from his debtor as collateral security, a bond and warrant of attorney held by his debtor against another person. The lord chancellor held that the creditor was liable for negligence, and that the rule would be the same as though the creditor had been employed by the debtor as an attorney to collect the debt. The same rule in a like case of the assignment of a debt by the debtor to his creditor as collateral security is also asserted in the case of *Williams v. Price*, (1 Sim. & Stu. 581.) The plaintiff, upon the rule of these cases, (and in all like cases of agency as between principal and agent,) is only liable for the loss of the Waite note on the ground of negligence. Negligence in such cases must be a question of *fact*. If there be a dispute about the facts, this must necessarily be so. (*Foot v. Wiswall*, 14 John. 307. 20 Pick. 167.) The plaintiffs in this suit cannot, in my view of the rule of liability applicable to such case, be made or held liable for the loss of the Waite note, except upon a distinct finding as matter of fact that the loss of said note was owing to their negligence, or was consequent upon such negligence. In the report of the referee the evidence of facts is stated, or certain facts found upon which the inference of negligence might be based; but the question of negligence, which was the chief question of fact upon which the whole counter-claim depended, is not found. The judgment in favor of the defendant, upon the issue presented by the counter-claim, is not based upon any finding of fact upon which it can be sustained. The court cannot draw the inference of fact from the fact stated, which may be warranted by the evidence. The referee, in such a case, must find the issue in

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one way or the other. In reviewing the judgment rendered by a referee, the court acts simply as an appellate court, and must reverse a judgment not warranted by appropriate findings on the questions of fact, if the proper exception is taken. The referee, it is true, finds as a conclusion of law that the plaintiffs undertook the collection of the note in question by legal process, and that they were liable for neglect to collect the same after the 15th of May, 1854. In this decision or finding the referee held and intended, I think, to decide as matter of *law*, that the plaintiffs were bound to use *legal diligence* in the collection of said note; and this, I think, was the cardinal error of the referee in the trial and decision of the cause. He applied to the case the rule applicable to guaranties and strict contracts for the employment and exercise of *legal diligence*. (1 *Wend.* 460.) It is only when such diligence, in express terms or by necessary legal inference, is required by the contract that it is obligatory. (*Morris v. Wadsworth*, 11 *Wend.* 104; *S. C.*, 17 *id.* 112.) In the trial of a cause before a referee, the referee exercises the functions both of a court and of a jury. So far as regards the questions of fact arising on such trial, he must find them in due form, and show the conclusions from the evidence to the same effect as if the issue were submitted to a jury. His findings in his report must be as explicit and distinct upon the facts as a special verdict of the jury, and his finding of facts is conclusive, upon the same principles. In the conclusions of law which the referee finds, they are necessarily stated in his report as based upon his findings upon the facts; but I apprehend they are to be in effect as distinct, and are to be considered and reviewed as distinctly, as would be the decision of a circuit judge in his charge to the jury in submitting the questions of fact for their decision. If the findings of law are unwarranted by the facts found, it is equally erroneous and exceptionable as would be the same errors of a judge in his charge to a jury. The facts found by the referee must sustain his findings upon the law, and the law of the case

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must be predicated upon such findings of fact. In this case, the conclusion of law of the referee as stated in his report we think not warranted by the facts found. To sustain a report and judgment allowing the defendants' counter-claim, the referee should have found, in substance, and to the effect that the plaintiffs were guilty of negligence in omitting to institute and prosecute with reasonable diligence a suit for the recovery of judgment upon the Waite note, and that by reason of such negligence the defendant had sustained damages to the amount remaining unpaid upon such note.

For the omission to make such findings in the decision of the case by the referee, the judgment is not sustainable and should be reversed, and a new trial granted with costs to abide the event.

[MONROE GENERAL TERM, December 2, 1861. *Smith, Welles and Johnson*, Justices.]

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AARON HARRIS vs. EPHRAIM HARRIS and others.

The section of the revised statutes relative to the proof of wills as lost or destroyed wills, provides one common and invariable rule in regard to the validity or effect of lost or destroyed wills taking effect after the passage of the act, viz: 1. That the loss or destruction must have occurred after the death of the testator, unless it happened fraudulently in his lifetime. 2. That in consideration of the importance of the instrument, and the uncertainty of parol testimony, its contents shall be clearly and distinctly established by two credible witnesses.

The language of the statute is general and unqualified, and the provision was intended as a rule of evidence of universal application to all subsequent cases, prescribing certain indispensable prerequisites to the proof, in any tribunal, for any purpose, of wills alleged to have been lost or destroyed; and is not to be limited to affirmative proceedings taken directly for the purpose of establishing such a will.

Hence, an instrument cannot be proven and established in any form, for any purpose, or between any parties, as a lost or destroyed will, unless its provisions are clearly and distinctly proved by at least two witnesses, or a correct copy or draft as an equivalent or substitute for one of them.

86	88
73h	284
36	88
85h	16
36b	88
155a	602

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The questions involved in a suit brought to establish a will as a lost or destroyed will, and in a subsequent action of partition between the same parties where such will is sought to be established as a lost or destroyed will, by a party claiming under the same, are identical. The same proof is required, to establish the will, in either case; and the question having been once passed upon by a competent tribunal, must be deemed at rest, and the former judgment conclusive. GOULD, J. dissented.

THE plaintiff, and the defendants Ephraim Harris, William Harris and Phebe Burnham, are the children and only heirs at law of John Harris, late of the town of Greenfield, in the county of Saratoga, deceased. The said John Harris died on the 8th day of February, 1859, at his residence in said town, seised of both real and personal estate, and seised of the lands described in the complaint in this action.

In July, 1856, the said John Harris made a last will and testament in due form of law. The terms of said will are specifically set forth in the case, and appear by the testimony of Elihu Wing, the writer thereof, and one of the subscribing witnesses thereto. No other witness was cognizant of, or testified to, the provisions of the will. The scrivener's draft or memorandum of instructions for drawing the will was given in evidence, but it was defective in several particulars, especially in regard to the devises and bequests to Ephraim Harris, about one half of each of the lines containing which was torn off, subsequently, as supposed waste paper, by a third person; thus making a portion of the devises and bequests and provisions unintelligible and imperfect.

The memorandum contained no statement of the charge upon Ephraim of Mrs. Burnham's legacy, in the event it was not paid by the testator. Nor did it on its face purport to be a perfect draft or copy of a will, or contain an introduction or close indicating its testamentary character. By the contents or provisions of this will, the whole real estate of the said John Harris was devised to his two sons, the defendants Ephraim and William Harris, and there was no devise

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of any portion of his real estate to the plaintiff, Aaron Harris, or to the defendant Phebe Burnham.

John Harris by said will bequeathed to his daughter, the defendant Phebe Burnham, the sum of \$1125, and therein provided that if he in his lifetime paid her that sum, it was to be in full of the legacy therein bequeathed to her. On the 9th day of September, 1858, John Harris paid to said Phebe Burnham the said sum of \$1125, and took her receipt therefor.

The said John Harris at the time he executed said will resided with his son, the defendant Ephraim Harris, and continued so to reside with Ephraim until his death, on the 8th day of February, 1859. The will, after it was executed, was inclosed in an envelope, and was taken by John Harris to his residence, and placed in a box in a small upper room, called a clothes-press, in the house where he lived, where it remained and where it was seen as late as the 4th day of February, 1859, the morning that John Harris was taken ill.

After the death of John Harris, search was made for the will. It was not found, and the defendants Ephraim Harris and William Harris, and Charles Harris, the testator's grandson, commenced an action in the supreme court, by summons and complaint, against the present plaintiff, Aaron Harris, and the defendants William Burnham and Phebe Burnham his wife, alleging in their complaint the making and existence of the aforesaid will by John Harris, and setting forth its terms, alleging its loss, and charging its loss and destruction to Aaron Harris, (the present plaintiff,) and therein praying the judgment of the court that the said will be admitted to probate as a lost will. Issue was joined in that action. Such action, and the issues therein joined, were referred to the Hon. E. H. Rosekrans, as sole referee, who, after hearing the testimony, found and reported therein as facts: "That John Harris, deceased, made and published his last will and testament in due form of law, to pass real and personal estate. That said will was in existence at the time of

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the death of said John Harris, and was fraudulently destroyed after his death by the said Aaron Harris. That the provisions of said will were not proved by two witnesses, and that no correct draft or copy thereof was proved; that the same could not be allowed to be proved as a lost or destroyed will, under article 3d, chapter 6th, of part second of the revised statutes; and that the complaint of the plaintiffs should be dismissed without costs to either party."

A judgment was entered upon the report of the referee, on the 2d day of February, 1860. After such judgment was entered, and in March, 1860, this action was commenced by Aaron Harris against the present defendants, the plaintiff setting up in his complaint the decease of the said John Harris; that he was seised of the premises therein mentioned, (being the same premises devised to William and Ephraim Harris by the said will,) and claiming as relief that the said lands be partitioned.

The defendants William Harris and Ephraim Harris, in their answers, allege the making and publishing of said will, setting forth its terms, alleging that they are the owners of the said lands in the manner specified in the will, and that the plaintiff, Aaron Harris, and the defendant Phebe Burnham, have no interest therein. They also set forth the payment to the defendant Phebe Burnham of the said \$1125, (being the sum bequeathed to her by the said John Harris by said will,) and the giving by her of said receipt, and ask that the complaint be dismissed. The defendants Phebe Burnham and William Burnham denied the matters set forth in the complaint.

The plaintiff replied to the answer of the defendants Ephraim Harris and William Harris, and their wives, and set up the proceedings and judgment in the case tried before Justice ROSEKRANS. Upon these issues the action was tried at the Saratoga special term in July, 1860, before Justice POTTER, without a jury, whose decision or finding is con-

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tained in the case. The finding of Justice POTTER sustains the foregoing statement.

For the purpose of aiding to prove the contents of the will, the defendants offered in evidence a memorandum, previously made by the witness Elihu Wing, the draftsman who drew the will, of its provisions, and made for the purpose of enabling him to draw it. A portion of the contents had been torn off the memorandum. The plaintiff objected to its reception, but the objection was overruled and the same was received in evidence. The defendants also offered in evidence the receipt of the defendant Phebe Burnham, dated the 9th day of September, 1858, executed and delivered to the testator before his death, for \$1125, which was objected to by the plaintiff, but the objection was overruled and the receipt admitted in evidence.

The conclusions of law of Justice POTTER are contained in the case, and were, in substance, 1st. That the said John Harris, deceased, in July, 1856, made his last will and testament relating to both real and personal estate. That it was duly executed by him with all the forms and requirements of the statutes, and that said will was in full force and effect, unrevoked by the said testator, at the time of his death. 2d. That by the terms of the said will, the plaintiff in this action had no interest in the real estate of the said testator that gave him the right to institute an action for the partition thereof. 3d. That by the terms of the said will, and payment of the amount bequeathed to her, and acceptance of the same, the said Phebe Burnham had no right or interest in the real estate of the testator. 4th. That the judgment in the action tried before Justice Rosekrans as referee is not conclusive as to the validity of said will, and is ineffectual against the devisees of the real estate of John Harris in establishing their title to said real estate, in this action. 5th. That the plaintiff's complaint in this action be dismissed, and that the defendants have their costs.



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A judgment was entered in accordance with this decision, from which the plaintiff appealed to the general term.

*William Hay* and *L. B. Pike*, for the plaintiff, (appellant.)

*John H. Reynolds*, *A. Pond* and *W. T. Odell*, for the defendants, (respondents.)

HOGEBOM, J. The parties to this suit are the children of John Harris, deceased. The action is for partition of land; and the plaintiff claims an equal division of the same among the parties as tenants in common, by reason of the death of their father intestate. The defendants Ephraim Harris and William Harris deny the intestacy and tenancy in common, and set up title in themselves, respectively, in several and distinct portions of the land sought to be partitioned, by virtue of a devise thereof to them by the will of their said father, John Harris. The plaintiff replies to the defendants' answer, denying the same, and alleging that previous to the commencement of this action, said defendants commenced an action in the supreme court against the plaintiff and the other defendants to establish the said will as a lost or destroyed will, and that such proceedings were had therein that judgment was duly entered in said action that said will could not be proved as a lost or destroyed will, and that said defendants had no interest in the property described in the complaint, by virtue of said will.

This was the issue to be tried, and the proofs showed that such former action was instituted, the judgment therein being that the will be not allowed to be proved as a lost or destroyed will, and that the plaintiff's complaint be dismissed without costs to either party. The report of the referee before whom the said cause was tried, and on which report the judgment was entered, found as facts in that case, (substantially as the judge in this case has found,) that John Harris did make and publish such last will and testament in due

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form of law to pass real and personal estate; that said will was in existence at the time of the death of the said John Harris, and was fraudulently destroyed after his death by the said Aaron Harris; that the provisions of said will were not proved by two witnesses, and that no correct draft or copy thereof was proved; and that therefore, as a conclusion of law from said facts, the said will could not be allowed to be proved as a lost or destroyed will, under article third, chapter sixth, of part second of the revised statutes.

The important question thus presented is, therefore, whether the judgment in the former action is conclusive in this; for I agree with my brother GOULD that if it is not, and if the provisions of the revised statutes above referred to are limited to direct proceedings for the establishment of a lost or destroyed will, the result to which Mr. Justice POTTER arrived on the trial of this action was well warranted by the facts, and the judgment ought to be affirmed.

The general rule on this subject is well known to be that a former judgment of the same court, or of a court of concurrent jurisdiction, directly upon the point in issue, is, as a plea in bar or as evidence, conclusive between the same parties, or others claiming under them, upon the same matter directly in question in a subsequent action or proceeding. (*Gardner v. Buckbee*, 3 Cowen, 120. *Burt v. Sternburgh*, 4 id. 559. *Wood v. Jackson*, 8 Wend. 9. *Etheridge v. Osborn*, 12 id. 399. *Embury v. Conner*, 3 Comst. 511. *Doty v. Brown*, 4 id. 71. *Ehle v. Bingham*, 7 Barb. 494. *Kingsland v. Spalding*, 3 Barb. Ch. Rep. 341.)

Such judgment or adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided, as incident to or essentially connected with the subject matter of the litigation, and every matter coming within the legitimate purview of the original action both in respect to matters of claim and of defense. (*Bruen v. Hone*, 2 Barb. 586. *Embury v. Conner*, 9 Comst. 511, 522. *Haeir*

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v. *Baker*, 1 *Seld.* 357. *Davis v. Tallcot*, 2 *Kern.* 184. *Hayes v. Reese*, 34 *Barb.* 156.)

In some cases, for example, where the grounds upon which the judgment proceeded do not appear from the record itself, and where from the record itself it cannot be determined whether a particular claim or security was involved in the litigation, it is competent to prove the same by parol testimony, provided they be such as might have been given legitimately in evidence under the issue, and must have been directly and necessarily in question as the grounds of the verdict. (*Wood v. Jackson*, 8 *Wend.* 9. *Lawrence v. Hunt*, 10 *id.* 80. *McKnight v. Dunlop*, 4 *Barb.* 36, 44. *Young v. Rummell*, 2 *Hill*, 481. *Dunkel v. Wiles*, 1 *Kern.* 420.)

The former action was instituted to establish the will in question as a lost or destroyed will, under the authority of 2 *R. S.* 67, 68, §§ 63 to 67, inclusive. These sections confer upon the court of chancery—now the supreme court—where a will shall have been lost or destroyed, the same power to take proof of the execution and validity of the will and to establish the same, as in the case of lost deeds.

The decree establishing the will is to be recorded by the surrogate, and letters testamentary or of administration with the will annexed are to be issued thereon by him. To entitle a will to be allowed to be proved as a lost or destroyed will, it must be proved to have been in existence at the death of the testator, or to have been fraudulently destroyed in his lifetime; and its provisions must be clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness. It was under this statute that the proceedings were had, in the action first commenced, and they failed of success for want of the requisite amount of proof. There was a lack of the requisite number of witnesses to establish a compliance with the statutory conditions. And as the suit was an equitable action, and the complaint was dismissed without incorporating in the judgment a clause that it should be without prejudice to

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a new action for the same cause, it is probably conclusive upon the parties, that for the purposes intended by the statute, the will can never hereafter be established. (*Coit v. Bland*, 22 How. Pr. Rep. 2.)

The important question is as to the effect of the adjudication; whether it is that there is no valid will of the testator, none that can take effect for any purpose, none that can be proved according to the forms of the common law, none that can ever be established in any action in relation to lands between the parties to such an action, and for the purposes of such an action; or, whether it is, that no will has been or can be sufficiently proved to establish it as a lost or destroyed will for the purposes of the statute, that is, for the purposes of record and of probate, for the ordinary purposes of surrogate proof and action, for the purposes of granting letters testamentary or of administration thereon, as an instrument of evidence, good when thus established, for all purposes and all parties.

I was at first inclined to think the latter purposes were the only ones contemplated by the statute, and that on a trial at law, or in an action for partition, the case was still open, for the proof of the will, for the purposes of the action, to the ordinary evidence admissible for the purpose of proving instruments which are lost or destroyed; that is, that secondary evidence of the contents was admissible, and if it made out satisfactory proof of the contents of the instrument, and of a compliance with the statutory requisites necessary to give validity to any will, then that the will as between the parties to the action, and for the purposes of the action, was to be deemed established. It almost seemed to be an unjust discrimination in favor of wills actually in existence and against those accidentally lost or destroyed, or fraudulently so without fault on the part of parties interested therein, to require for the latter, beyond the former, additional proof beyond such as satisfactorily established such loss or destruction and the contents of the instrument, to require what is

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not required in ordinary cases, that its provisions should be established by at least two credible witnesses. But upon a more deliberate consideration of the terms of the statute in question, I am convinced that my first impressions were erroneous.

By 2 *R. S.* 68, § 74, [67,] it is provided, that “No will of any testator, who shall die after this chapter shall take effect as a law, shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the lifetime of the testator; nor unless its provisions shall be clearly and distinctly proved by at least two credible witnesses—a correct copy or draft being deemed equivalent to one witness.”

I am of opinion that this statute prescribes one common and invariable rule in regard to the validity or effect of lost or destroyed wills taking effect after the passage of the act; that is, 1. That the loss or destruction must have occurred after the death of the testator, unless it happened fraudulently in his lifetime. 2. That in consideration of the importance of the instrument and the uncertainty of parol testimony, its contents shall be clearly and distinctly established by two credible witnesses.

I have come to this conclusion, for the following reasons:

1. The provisions of this section appear to be general in their nature—intended to be applicable to all wills coming into operation since the revised statutes—and not from the context or from the apparent object of the statute restricted to proceedings initiated for the purpose of proving and establishing the instrument as a record, or as the foundation for the administration of an estate. The language is general and unqualified, and occurs after all essential directions have been prescribed for the mere *mode* of proceeding in probating such a will; and seems to be intended as a rule of evidence of universal application to all subsequent cases, prescribing certain

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indispensable prerequisites to the proof, in any tribunal, for any purpose, of wills alleged to have been lost or destroyed.

Would it be claimed that since the passage of this act a will could be proved as a lost or destroyed will, either in equity or at common law—either for the general purposes of probate and record, or in an action of ejectment between the parties to the action—unless it was made positively or satisfactorily to appear that the will was in actual existence at the death of the testator, or fraudulently destroyed before that time? If not, then why are not the subsequent clauses of the section, as to the number of necessary witnesses, equally applicable to all cases and to all tribunals and between all parties where the question can possibly arise.

2. I draw this conclusion also from a consideration of other sections of the revised statutes in regard to wills. Section 42 (2 R. S. 64) prescribes the mode—the only mode—in which a will can be *revoked* or *canceled*; and provides that when the cancellation for the purpose of revocation is by being burnt, torn, canceled, obliterated or destroyed by another person than the testator, but by his direction and consent, such direction and consent and the fact of such injury or destruction shall be proved by at least two witnesses. Can it be doubted that this is a rule of evidence applicable to all cases and all contingencies—to every forum and every form of proceeding? Would a court of common law, in an action of ejectment, venture to hold that evidence of such revocation, established by less than two witnesses, would suffice for a verdict or judgment even as between the parties? I apprehend not.

Various other provisions in regard to wills, of a general nature and obviously designed for universal application, are found interspersed among those sections of the revised statutes and amendatory acts which prescribe the mode of proceeding to prove a will before surrogates' courts. It may sometimes be a little difficult to determine whether a particular provision was designed for universal application or for

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the routine of proceeding in the probate court; but I know of no other mode of determining the question than by considering the language of the statute, its apparent object, the context, and instituting a comparison with other sections of a kindred character.

3. I draw the same conclusion from a consideration of the *confusion* and *inconsistency* which would arise from a contrary determination. If the provision in question is limited to affirmative proceedings taken directly for the purpose of proving and recording the will and the consequent administration of the estate, then one rule may obtain in these proceedings and a different and inconsistent one in the courts of common law. Then a will of real and personal estate may, as in this very case is attempted to be done, be established between parties to an action of partition or of ejectment and be conclusive upon them, which, when attempted to be set up as a lost or destroyed will by proceedings having that object in view, between precisely the same parties, shall be utterly ineffectual for such purpose. As a consequence intestacy may be decreed in the probate court, and an equal distribution of the personal property be made among the children, founded upon the theory of their equal participation in the real estate by the laws of descent; when an action of ejectment and an application of the rules of the common law to the proof of wills and of lost instruments may give the whole real estate to a child, who received such a share of the testator's bounty by virtue of the provisions of the lost will, solely in consideration of the fact that by virtue of other provisions of the same instrument his brothers and sisters became the legatees of the entire personal estate. I do not think this was intended by the legislature, and I am therefore forced to conclude that under the revised statutes an instrument cannot be proven and established in any forum, for any purpose, or between any parties, as a lost or destroyed will, unless its provisions are clearly and distinctly proved by at least two

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witnesses, or a correct copy or draft as an equivalent or substitute for one of them.

If these views are correct, then the question involved in both actions is similar and identical. The same proof is required to establish the will in either case, and the question having been once passed upon by a competent tribunal, between the same parties, must be deemed at rest and no longer open to contestation.

But if from the peculiar language of the judgment in question, or from a consideration of the effect of a dismissal of the complaint under the code, (*see Coit v. Bland*, 22 How. 2,) it should be deemed that the former judgment was only equivalent to a nonsuit, and that the question is therefore still open upon the merits, I concur with all the judges who have examined the question—Justice ROSEKRANS, who decided the first action; Justice POTTER, who pronounced the judgment now under review; and Justice GOULD, who has examined the case at general term—that the provisions of the will have not been clearly and distinctly established by two witnesses, or by one witness and a correct copy or draft as an equivalent for another. Only one witness speaks with knowledge of the provisions of the will, and the scrivener's memorandum is too imperfect to amount to a correct copy or draft. It has neither the usual or any introduction or close, indicating its testamentary character. The devise of the home farm is not contained in it; nor any specific description by which the 44 acres could be identified or located; a very imperfect and by itself unintelligible description of the devise to Ephraim of the Knickerbacker lot; an incomplete bequest of the household furniture and statement of the provision made for Aaron, and an entire omission of a clause alleged to be in the will, charging Ephraim with the payment of Mrs. Burnham's legacy, in case it was not paid by the testator. These defects are vital, and take away from the memorandum all pretense of being a correct copy or draft of the lost will.



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The deceased must therefore be regarded as having died intestate, in the same manner as if he had attempted to make a will which failed for want of a formal execution.

The plaintiff was right in commencing the action for partition, and in my opinion the judgment of the court below should be reversed, and a decree might now be properly entered for the partition of the premises in controversy. The case is novel and the principles involved in it important; and although the defendants have failed in the controversy, I do not think they should be charged with the costs of the litigation, but that the costs of all the parties should be charged upon the fund or estate in controversy, in the manner usual in actions for the partition of lands.

It has been more usual with us on reversing the judgment of the court below to grant a new trial; and that course will be pursued in the present instance; although all the facts which can be made to bear upon the case have probably been already developed. If no further facts appear, the tribunal which disposes of the case on the new trial can make such disposition of the additional costs, and indeed of all the costs in the action, as shall under the circumstances be equitable.

The judgment of the court below must be reversed, and a new trial granted, with costs to abide the event, unless the parties are satisfied that the case cannot be changed, and waive so much of the order as contemplates a new hearing of the case.

PECKHAM, J. concurred.

GOULD, J. dissented. (See his opinion, *post*, p. 574.)

Judgment reversed.

[ALBANY GENERAL TERM, December 2, 1861. Gould, Hogeboom and Peckham, Justices.]

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36	102
57h	481

36	102
134a	360

36	102
71h	119
71h	157

36	102
75h	567

An inland lake, five miles long and three-fourths of a mile wide, having no current and no main inlet, is not, in any legal or just sense of the term, navigable water. It is not a highway, and is too small to be of any practical use in navigation, except as a connecting link of some chain of internal improvement.

Where the state issued a patent, embracing a portion of such a lake within its boundaries, the northern line crossing the lake, but there was no restriction, or exception of the lake, no reference made to it, and no reservation of the water, or the land under water; *it was held* that the grant carried the southern portion of the lake to the grantee, absolutely.

Where lands are bounded, in a deed of conveyance, by a lake of that description, and the outlet thereof, the title of the grantee extends *usque ad medium filum aquæ*. At all events, the deed will carry the right to land subsequently filled in, where the water is shallow, immediately in front of the grantee's premises.

Where the state has sold and conveyed land bounded by a *navigable* lake or river, it holds the title to the land under water in front of the premises as *trustee* for the *public*, in order to protect navigation and prevent hindrances or obstructions. At the same time, the state declares itself *trustee* for the *riparian proprietor*, and provides that grants shall be made to him alone, and that they will be made not only for purposes of commerce, but, whenever proper, for the beneficial enjoyment of his adjacent lands.

† When the proper and constituted authorities of the state proceed to deepen the outlet of a lake, and deposit the earth and stones that are removed, in the shallow water in front of and adjacent to premises previously conveyed to another by patent, it is a visible and public declaration that that portion of the lake can no longer be used for navigation; and the grantee will enter into possession, and the trusteeship of the state, both for the public and the riparian proprietor, is virtually at an end.

And such land being proper and necessary for the beneficial enjoyment of his adjacent premises, by the riparian proprietor, there arises if not a legal at least a strong equitable title, which being coupled with actual possession, no one, except the state itself, should be allowed to dispute.

No action will lie against such riparian proprietor, in favor of an adjoining owner, to restrain the planting of trees upon such newly acquired land, and thereby obstructing the plaintiff's view of the lake. BALCOM, J. dissented.

In New York the public have no highway along the margin of our navigable rivers and lakes, unless the same has been acquired by express grant or prescription. *Per* CAMPBELL, J.

CAZENOVIA LAKE is a natural body of water, situate in the town of Cazenovia, in the county of Madison,

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about five miles long and three-fourths of a mile wide. On the 20th day of October, 1794, Edward Edwards received from the state of New York a patent purporting to convey to him 15,000 acres of land, described by certain metes and bounds. The north line of said boundary crosses Cazenovia lake a short distance north of the south end thereof, and includes within its boundaries all the premises in any way referred to in this case. The plaintiff owns a farm situate at the south end of said lake, and has upon it his dwelling house situate about 100 rods from the lake. The defendant owns the land lying upon the east shore of the lake, bounded by the lake and outlet thereof, upon which is situate his dwelling house, very near to the shore of said lake, in which dwelling the defendant and his father have resided for the last 37 years. In the years 1856 and 1857, the people of the state of New York, by their agents, the canal commissioners and engineers, lowered the outlet of said lake for the purpose of using the Cazenovia lake as a reservoir and feeder for the Erie canal, and in doing said work they excavated out into said lake and deposited the earth excavated in shallow water of the lake adjoining the defendant's said premises, thereby making about one-fourth of an acre of dry land, extending into said lake from the defendant's shore about 160 feet. The work was done by the defendant under contract with the state, and was necessary for state purposes. The defendant immediately took possession of said land and laid out large sums of money in grading and beautifying it; and the plaintiff was often upon the work and found no fault with it, but commended it as being a fine improvement. After the work was completed and improvements made, and the defendant had set out trees on the new land, the plaintiff objected to the trees growing, claiming that they intercepted his view of the lake. As great a part of the plaintiff's view of the lake is already cut off by trees growing on his own premises, as will be by the trees set out by the defendant. The plaintiff brought this suit, claiming title to the bed of the lake, and

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that the trees so set out by the defendant will at some future day be an injury to the plaintiff by cutting off his view from a portion of the lake. The action was referred to a referee, who found and reported the following conclusions of law: 1st. That the defendant had no right to set out or grow trees on the land made in said lake by deposits of earth, and had no right to keep the trees on said land set out by him, and that he had no right to set out or grow other trees on said land. 2d. That the plaintiff had not and never had title to any portion of the land under the water of said Cazenovia lake. 3d. That the defendant had not and never had title to any portion of the land under the water of Cazenovia lake. 4th. That the people of the state had title to the bed of said lake, and said lake is and always has been public property. 5th. That the people of the state own said land made in said lake by deposits of earth, and have the same title thereto, and no other, that they have to the bed of said lake; and said land is public property. 6th. That said lake and the land made therein by deposits of earth as aforesaid are a public highway. 7th. That the special damage sustained by the plaintiff, by reason of the setting out of said trees by the defendant on the land, and the special damage the plaintiff would sustain if the defendant should keep said trees on the land, or grow them or other trees on said land made in the lake as aforesaid, entitled the plaintiff to maintain this action, and to a judgment that the defendant remove from said land the trees so set out by him, and refrain from planting or growing any trees upon said land. 8th. That the plaintiff was entitled to an injunction, commanding and requiring the defendant to remove the trees from said land set out by him as aforesaid, and restraining the defendant from planting or growing trees on said land. 9th. That neither party was entitled to costs against the other, but each party must pay his own costs in the action and half the fees of the referee. To each and every part of which conclusions the defendant excepted.

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From the judgment entered upon this report, the defendant appealed to the general term.

*D. W. Cameron*, for the appellant. I. The plaintiff never had any title to the premises in question, nor to the land underlying any part of the Cazenovia lake. (1.) The patent, as well as all the deeds under which the plaintiff claims, never conveyed the lands underlying the lake. The plaintiff claims in his complaint, and the referee finds, that "Cazenovia lake" is a navigable body of water, three-fourths of a mile wide and five miles long. The ownership of navigable lakes is in the public. Chancellor Walworth, in 5 *Wendell*, 423, speaking of the fresh water lakes in this state, says that the shores, down to low water mark, belong to riparian owners, and *the beds of the lakes, with the islands therein, to the public*. See also the conclusions arrived at by the chancellor in note on page 424, and his opinion on page 447; also conclusions arrived at by him in 17 *Wendell*, 571, 2. If there was any power short of the legislature to dispose of the land underlying our large navigable lakes, it is quite clear that the same power would dispose of the land underlying large navigable rivers and lakes for the promotion of the commerce of the state. But this power has always been vested in the commissioners of the land office, whenever and wherever it has been exercised by any department of the state government. By the revised statutes, the power is given to the commissioners of the land office *to grant to the adjacent* owners so much of the land under the navigable rivers and lakes as shall be necessary to promote the commerce of the state, and declares grants made to any others than adjacent owners void. (1 *R. S.* 5th ed. 552.) The wisdom of the legislature in restricting these grants to the owners of the adjoining land cannot be questioned, and it will not be presumed that a right thus carefully guarded and protected by the legislature from the first time we ever had any legislation concerning it, was before disposed of without any authority from the peo-

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ple, or in other words, the public, speaking through their only representative, the legislature. See also each edition of the revised statutes; also 1 *R. L.*, 1813, p. 293, § 4; *Kent & Radcliff's ed.*, 1801, p. 299, § 11. It is true that this provision did not include *lakes* until 1815, when, by an amendment, the provision was made to extend to *lakes*. (*Laws of 1815, chap. 199, § 1.*) The reason for this is undoubtedly the fact, that up to this time no circumstances had required a provision of this kind. Commerce had called for grants and improvements along many if not all our large rivers, many years before the shores of any of our inland lakes had needed improvements to satisfy her demands. It cannot be shown that any department of the government assumed the right to dispose of the land underlying lakes, *even with these restrictions*, until after the act of 1815. See special acts granting islands above tide water in navigable rivers, cited in 13 *Wendell*, 359, 60.

II. If there was any force in the plaintiff's position that the patent gave a legal title to the land under the lake, public policy and equity would compel him to relinquish such claim so far as he conveyed the adjoining lands and bounded them by the lake. The legislature, by restricting the commissioners of the land office to sell only to adjoining owners, shows clearly its intention that no other than such adjoining owner should ever become owner of the land under the water. If Mr. Lincklaen, at the time he deeded the Ten Eyck premises, was the owner of the adjoining land covered by water, it passed with the land conveyed, as an appurtenance, as a right and privilege without which the premises conveyed would be comparatively worthless. The legislature took this view of the question when they enacted that it should only be conveyed as such appurtenance. (1 *R. S.* 5th ed. 559.) The doctrine that a conveyance of land bounded by a stream or large navigable river extends to the middle of the stream, would hardly be denied, except when the words used show an intent to limit the grant to the shore. (3 *Kent's Com.* 7th

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*ed.* 514 to 520, and notes. 17 *Wend.* 404. 20 *id.* 149. 5 *id.* 423. 4 *Hill*, 369. 2 *Hil. R. Es.* 97, 357. 2 *Smith's Lead. Cas.* 216 to 227.) No case cited by the plaintiff *holds directly* that this principle does not apply to fresh water lakes. Nearly every case arose in regard to a mill privilege, and the "pond" was held to be a monument. In one of the cases the court holds that where the pond was created by a dam, the conveyance goes to the center. But in no case is the distinct question raised and decided by the court that a conveyance bounded by a fresh water lake does not convey *all the rights which the grantor has to the center*. There can be no force in the plaintiff's position that there must be a thread or gutter to which the conveyance runs. It will hardly be contended that the waters of our large navigable rivers are to be either *sounded* or dried up, in order to find just where the thread of the stream is. Wherever the question has arisen in regard to *islands* in rivers, it was the *center*, not the thread or lowest point, which governed. The same rule may be applied to lakes, and undoubtedly will be, *if the grantor have any interest underlying the lake to convey*. We think the more sensible rule to be, that he has no such interest; that it remains in the public; but if he has, it passes with the adjoining lands as an appurtenance.

III. If the plaintiff ever had title to the premises, it was extinguished by being appropriated by the state, whereby the legal title or fee vested in the state. (1.) The *resolution* passed by the canal board before the commencement of the work is an appropriation of the whole lake, not of the waters thereof, nor of any specific part, but of the lake. By no fair or reasonable construction can this resolution be held to appropriate only the water. The general rule is, that the map is to be referred to as showing what the resolution was intended to cover. (15 *Barb.* 627.) But in this case the resolution speaks in more plain and unmistakable language than a map can be made to speak. The map introduced by the plaintiff is only the original plan by which the outlet was to



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be constructed so as to make the lake available for the purposes intended. The resolution offered by the plaintiff, showing an appropriation of the waters of the lake, rather confirms than negatives the idea that the first resolution takes the land underlying it; then, as if doubting whether the *water* had been appropriated, they pass this second resolution. The word lake should have a definition at least as broad as that judicially given to "*pool*," which includes land and water. (2 *Hil. R. Prop.* 356.) There can be no difference in the meaning of the terms, except that "lake" embraces or is applied to larger bodies of water. It would hardly be claimed by the plaintiff that the deeds which he introduced in evidence, and which purport to convey all ponds, pools, &c., only referred to the waters thereof. But these terms are not used in the original patent. They have been inserted in some of the more recent grants, doubtless for the purpose of sustaining an action similar to this. If the construction put upon the word "water" in 5 *Cowen*, 216, and *Co. Litt.* 4, 6, to which the plaintiff refers, is to prevail, then an appropriation by the state of the water of a run, or the water of this lake, would only give the state *the right to fish therein*. The word land includes every thing under and over it, but by a grant of water, only covers a right to fish therein. (2 *Black. Com.* 19.) See this authority for the distinction that prevailed between the word "water" and other terms used in grants. (2.) No formal resolution is necessary; but an entry upon and laying out of the work is sufficient. (15 *Wend.* 569. 2 *Hill*, 342. 19 *Barb.* 263. 6 *Hill*, 359. 1 *R. S.* 5th ed. 581, §§ 17, 18, 19.) See last authority for power of canal commissioners to construct works of this kind. The appropriation of the land, by the authorized agents of the state, confers the right to enter and use the soil, although the fee does not vest until the appraisal of damages. (2 *Hill*, 342.) But the title of the state in this case is as complete as if damages had been appraised and paid. Claim for damages must be made within one year after the premises are



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taken, or the individual entitled to damages “ shall be deemed to have surrendered to the state his interest in the premises so appropriated. (1 *R. S.* 5th ed. 594, § 84. 9 *Barb.* 496. 15 *id.* 627.) That this provision of the statute is not in violation of the constitution, is clearly held in 1 *Kernan*, 308. It was admitted upon the trial that no claim for damages was made by the plaintiff in this case. That the agents of the state, having full authority, entered upon the land in question and appropriated it to and for the use of the state, cannot be questioned. The evidence shows that the agents of the state took possession of the land and directed the work. The evidence of Mr. Fitzhugh does not in any way change or contradict the facts sworn to by the engineers. The work was not only done under direction of engineers, but the commissioners left the matter to their discretion, and never made objection to it. The fee simple of the lands vests in the state. (1 *R. S.* 5th ed. 596, § 95.) (3.) The laying out of the work was properly done by the engineers. It is the duty of the resident engineer, under the immediate direction of the division engineers, to lay out the work, &c. (*Id.* 610, § 180.)

IV. The plaintiff is estopped from claiming title to the property in question, or in any way objecting to the defendant's full enjoyment thereof, by reason of his own acts of acquiescence. The evidence shows that the plaintiff was present while said work was being done, and made no objection whatever—both while the state work was being done, and while the defendant was grading and beautifying the grounds upon his own account. Richmond testifies: “The plaintiff *was often on the work during its progress, and we often changed the line at his request, to gratify him.*” Van Brooklyn swears: “The plaintiff was frequently on the work during its progress. I don't recollect of his ever finding any fault, or making any objection to this filling up; he never made any objection or protest against it.” The defendant testifies: “The plaintiff was frequently on the premises while the work was in progress, and never attempted to stop or forbid it.

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He said he thought it was a very handsome improvement, and spoke of it as beautifying the whole town as well as my own premises." Again he swears: "The plaintiff never pretended to me that he had a title, and I never knew that he had or claimed title to it; he never spoke about it or objected to it until after the trees were set out." If the plaintiff had denied any part of this testimony, he was a competent witness and had already been sworn, but he does not refer to it; and we are to take the evidence as a plain and true statement of the facts. "If a party maintains silence when conscience requires him to speak, equity will debar him from speaking when conscience requires him to be silent." (*Hall v. Fisher*, 9 Barb. 17, 31. 1 *Story's Eq.* §§ 388, 9. 1 *John. Ch.* 344, 353. *Storrs v. Barker*, 6 *id.* 166, 170. *Niven v. Belknap*, 2 *John.* 573, 589. 2 *Lead. Cas.* 64, 65. *Higinbotham v. Burnet*, 5 *John. Ch.* 184. 6 *Seld.* (10 N. Y.) 412. 27 Barb. 595.) A man is concluded from saying any thing, even the truth, against his own act or admission. If a man knowingly, though passively, by looking on, *should suffer* another to purchase or expend money on or about a mill site, *under an erroneous impression of his title, without making known his claim*, he cannot afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience would be bound by such equitable estoppel. (*Ang. on Water Courses*, 403. 1 *John. Ch. R.* 344, 353.) The supreme court of Massachusetts lays down the principle in the following unmistakable language: "When one stands by and sees another laying out money and making large investments upon property to which he himself has some claim or title, and *does not give notice of it*, he cannot afterwards, in equity and good conscience, set up such claim or title." (*Gray v. Bartlett*, 20 *Pick.* 193.) Ignorance of the law will not prevent the application of the rule of equitable estoppel, when the circumstances would otherwise create an equitable bar to the legal title. (6 *John. Ch. R.* 166. 27 Barb. 595.) The only case cited by the

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plaintiff before the referee, holds simply that where a person gives a receipt to a corporation as such, it is no estoppel, and either party may disprove it. (8 *Wend.* 480.) This principle has always been termed elementary, that a receipt may either be explained or contradicted.

V. The referee erred in holding that the dry land made by the state, adjoining the defendant's premises, is a public highway. (1.) The distinction between a "public highway by land" and a "public highway by water," is precisely the same as between "land" and "water." The definition of either is simply an "easement or right of way," while one is a right of way over land, and the other is a right of way over water. In regard to navigable lakes and rivers, the soil is private property, belonging either to the owner of the adjoining shore or to the state. Sir Matthew Hale, in his excellent *Treatise*, discusses the rights which the public have upon navigable waters, and says "*they are public highways by water.*" (*Harg. Tracts, De Jure Maris, &c. Angell on Water Courses*, § 535.) If this be the correct rule, it will hardly be claimed that after the water is diverted to some other bed, or shut off by government, the dry land is still a highway by water, or in other words, a highway over which the public can float vessels, boats or rafts. If a river changes its course and runs over a cultivated field, the new channel is *the public highway by water.* (*Angell on Water Courses*, § 540.) It will not be pretended that there will thus be created two public highways running parallel—one by land and the other by water. (2.) The action of the legislature is totally at war with this idea that the dry land thus created is a highway. The legislature has authorized the commissioners of the land office to convey to the adjacent owners the land under navigable waters; and for what purpose? To convert into a more valuable highway, either by land or water? Most certainly not. The language of the statute is: "The commissioners of the land office shall have power to grant in perpetuity, or otherwise, so much of the lands under

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the waters of navigable rivers or lakes as they shall deem necessary to promote the commerce of this state, or proper for the purpose of beneficial enjoyment of the same by the adjacent owner." (1 *R. S.* 5th ed. 552.) It is quite certain that a grant made to an adjoining owner, under this statute, would give the grantee the right to convert it into dry land, and treat it as it would be, in fact, his own private property. If it is private property in the hands of the grantee of the state, and not a public highway, what can render it other than private property in the hands of the state? The grantee can have no greater rights under his grant than the grantor had to convey; and what the grantee could do, the grantor can do with precisely the same effect.

VI. The referee erred in finding that the state own the dry land made in said lake adjoining the defendant's premises, and that the defendant had no more right in it than to a public highway. (1.) The defendant is in full possession of the premises, and owns the fee in the adjoining land. This gives to the defendant additional rights in the adjoining waters or shore thereof, not common to all the citizens of the state. In *Angell on Tide Waters*, at p. 171, the principle is laid down as follows: "Riparian proprietors, it appears to be well settled, cannot be cut off from the water against their consent by any extraneous additions to their upland." In *Ball v. Slack*, (2 *Wharton*, 541,) Hutson, J. says: "The case of *Blandell v. Catterall* decides that although the king or the public may sail over land covered by the tide when up, yet the owner of the adjacent fast land can support trespass against one exercising acts of ownership at low water. And it must be so. If wharves can be erected between a man and the river, why not houses? And if he has no remedy, a stranger may come between him and the river, and make his farm what is called a dry land farm." In *Bowman's Devisees v. Walthen*, (2 *McLean*, 381, 2,) Justice McLean says: "It is enough to know that the riparian right on the Ohio river extends to the water, and that no supervening right over any part of this

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space can be exercised or maintained without the consent of the proprietor. He has the right of fishing, of ferry, and of every other right which is properly appurtenant to the soil, and he holds every one of these rights by as sacred a tenure as he holds the lands from which they emanate. The state cannot directly or indirectly divest him of any of these rights, except by the constitutional exercise of the power to appropriate private property to public uses." There is no pretense in this case that this dry land, or the defendant's right to a water front, has been appropriated by the state. It is the lake, and not the dry land they have made, which is being used for state purposes. The defendant, when he procured title to his land bounded by the lake, had with it certain rights which greatly increased its value. He has erected upon it a magnificent mansion, the yard and grounds of which border upon the lake. He has the exclusive right to fish upon the shores, to erect a landing place for his own private use, pleasure and profit. He has the right to the increase of the shore, by gradual accumulation or receding of the water. He has a right to the deposits made on and about the shore, either to enrich his lands or any other purpose; and not least among these rights is one to rear either ornamental or shade trees. If the decision of the referee be correct, then the state is bound to maintain this strip of made land as a public highway without a hearing, and the defendant is not to hold, occupy and enjoy his premises down to the lake, as he always has done, without the assent of the plaintiff and such other persons as may desire to question that right. (2.) The defendant has a title which has come down from the state, bounding him "on the west and south by the lake and the outlet thereof." The state is thus bound to give us a boundary by the lake, unless some great public necessity shall require the state to take from us that right. No such necessity exists. The state does not claim it. It is not necessary that it should hold or possess the land in question, either for purposes of navigation or for using the lake

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as a reservoir, but it has left us in the full enjoyment of our rights. The only fair and reasonable conclusion is, that when the officers of the state thus built up dry land between the defendant's shore and the waters of the lake, our title still ran to the lake. This, at least, is a full answer to any demands which the plaintiff may set up against the defendant's possession. (3.) The defendant being in possession, and there being a legal mode by which he may have obtained the title, the plaintiff must give some evidence showing that the title is not in us. The presumption of law is, that we have title to all the land we occupy.

VII. The cases cited by the plaintiff to sustain the proposition that the plaintiff is entitled to recover if the state own the lake, do not affect the question before this court. The case in 6 *John. Ch. R.* 439 is where a party obstructed a street, which was a public thoroughfare. It was an obstruction which was a special damage, not in fancy but a pecuniary damage, and entitled the plaintiff to the protection of the courts. Several of the cases cited are where individuals owning tracts of land laid it out into lots, streets and parks, and then sold the lots with reference to a map representing the survey. The court held that the party could not afterwards inclose and build upon the streets thus laid out. The grantor had received an increased price by reason of the opening of those streets and parks; and the purchasers, having paid for these appurtenances, were entitled to the full benefit accruing from them. This principle in no way charges the defendant with a wrong, but on the contrary, is good authority for claiming our title to the waters of the lake, a claim which the state in no way disputes.

VIII. The old common law doctrine in relation to ancient lights does not prevail in this country. (*Mahan v. Brown*, 13 *Wend.* 261. *Parker v. Foote*, 19 *id.* 309. 3 *Kent's Com.* 448. 10 *Barb.* 537.) In *Mahan v. Brown*, it was held that a man might open a window in his own house overlooking the privacy of his neighbor; and unless the right to the

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window light had been secured by grant, acquiescence, or otherwise, the only remedy for B. would be the erection on his own soil of an obstruction opposite the offensive window, and in that way shut out the light. In *Parker v. Foote*, our supreme court went so far as to declare that the modern English doctrine on the subject of lights and prospect was an anomaly in the law, and not applicable to the growing condition of this country. It further declares, that the injury resulting from window or other views are rather speculative, and not analogous to the case of ways, commons, markets, water courses, &c. where the injury is direct, palpable and material; and the same rule of presumption ought not to apply to two classes of cases so essentially different. Every case presented by the plaintiff and cited by the referee were cases where the injury was direct and material, and related to a street, way or water course, not for a prospect or loss of view, but for an obstruction to passage or use. They had no relation whatever to a look-out or view, and are consequently inapplicable to the present case. No action can be sustained for obstructing a look-out or view. (2 *Hil. Real Prop.* 79, § 19.) Even the English law, with all its "anomaly," does not recognize a servitude of mere prospect, except by express grant or covenant. (*Aldred's case*, 9 *Co.* 58. *Tindal, Ch. J. in Penwarden v. Chiny*, *Mood. & Mal.* 400. 13 *Wend.* 261. 19 *id.* 309. 3 *Kent's Com.* 7th ed. 549, *n. b, marg. p.* 448.)

IX. The decree directed by the referee is not asked for in the complaint, and the relief granted is based upon a theory in no way set out or referred to in the plaintiff's complaint. The only basis for the relief demanded, as alleged in the complaint, is title in the plaintiff to the bed of the lake; while the only relief demanded is the removal of the earth and stones so as to convert the dry land into lake. The plaintiff entirely failed to prove the facts alleged in his complaint as the basis of his action.

X. The referee erred in allowing the witness Smith to testify in relation to damages. The question of damage was



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for the referee. It cannot be said that the evidence had no bearing, from the fact that no damages were awarded. The question of damage was an important one with the referee in coming to a conclusion upon the right of the plaintiff to an injunction, and upon this question the defendant has a right to the opinion of the referee untrammelled by the views of other persons. The position that the piece of made land is a public highway, notwithstanding the fact that the defendant has always had exclusive possession of it since it was made dry land, cannot be maintained, either by authority or upon principle; and with possession, the defendant has the presumption of ownership. But in no possible event can the ancient rule of lights or prospect, even though it were not obsolete in this country, be made applicable to the growing of shade or ornamental trees in the defendant's inclosure, an hundred rods from the plaintiff's stand-point or look-out.

*D. Pratt and C. Stebbins, Jr.*, for the plaintiff. I. The defendant showed no title upon the trial to the *locus in quo*. (1.) The conveyance under which he claims, bounds his lands on the west by the margin of the lake. (2.) The rule that a conveyance of land, bounded upon a fresh water stream above tide water, carries the title to the center of the channel—*ad filum aquæ*—is not applicable to lakes and natural ponds. There is no reason why it should apply to them. In running streams it is desirable and necessary for the public interest that the riparian owner should own to the center of the stream, so that the power derived from the fall of water may be made useful. It is impossible to apply the rule to lakes or ponds. They have no current or channel. There is no *filum aquæ*. These lakes may be circular, oblong or irregular, with deep bays, and they are capable of being entirely surrounded with riparian owners, at the ends as well as sides. To ascertain the rights of such owners under this rule would be impossible. (3.) It is therefore settled by authority, that



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conveyances bounding the premises by lakes and natural ponds, convey the title only to low water mark. (*Murray v. Seaman*, 1 *Hawks*, 56. *Wood v. Kelly*, 30 *Maine Rep.* 47. *Bradley v. Rice*, 13 *id.* 198. *State v. Gilmanton*, 9 *N. H. Rep.* 461. *Canal Com'rs v. People*, 5 *Wend.* 423, 447. 19 *Barb.* 491. 17 *Wend.* 571. 13 *Pick.* 261.) (4.) But if the rule would apply, more than three-fourths of the lot would belong to the plaintiff.

II. The undisputed facts of the case show that the fee of the *locus in quo* is in the plaintiff. (1.) There was no dispute, upon the trial, but that the patent from the state and the other conveyances set out in the case were in fact executed as therein stated. (2.) It is not denied but that the land in dispute lies within the boundary lines, as set out in the patent to Edwards; and by mathematical calculation, it appears that the quantity (15,000 acres) calls for the whole space embraced within the lines. It is not necessary to prove by witnesses a fact which may be ascertained by mathematical calculation. Courts are presumed to be capable of making such calculations. "That is deemed certain which may be rendered certain." In the patent there is a mistake in the description, of 100 chains in the west line, which can readily be ascertained and corrected by the other lines and angles given. Correcting the mistake, the boundaries would contain just about 15,000 acres. (3.) Whether, therefore, the fee of the land under water passed to the grantee in the patent or not, was a question of law under the evidence, and we are not concluded, by the referee's finding, that it did not pass. (4.) Assuming that the same rule should be applied in this case which is applicable to tide waters, the fee of the land under water contained within the boundaries of the patent would pass to the grantee therein. "When a patent or grant conveys a tract of land by metes and bounds, the land under water, as well as other lands, will pass if the land under water lies within the bounds of the grant." (*Rogers v. James*, 1 *Wend.* 237.) This doctrine was applied in the above case

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expressly to a grant containing within its boundaries an arm of the sea. The grant in that patent, as given in the case, did not convey *all the lands under water*, as the learned referee assumes in his opinion, but described the premises granted by metes and bounds in the ordinary manner. The only difference between tide waters and fresh water streams in this respect is, that lands under the former will not pass by implication; but when they are clearly included in the boundaries, they will pass. (*Rogers v. James, supra. Child v. Starr, 4 Hill, 369. 2 Black. Com. 19. Champlain R. R. Co. v. Valentine, 19 Barb. 484. 3 Kent's Com. 427.*) The sovereign, at common law, could dispose of the soil under navigable waters at will. (*Comyn's Dig., Navigation B. Prerogative D, 88.*) The state has succeeded to the rights of the crown, and has vested in the commissioners of the land office the general power to direct the granting of unappropriated lands. This power was unrestricted, as to lakes, until 1815, and the act of that year was a restraining and not an enabling act, and therefore no previous want of power can be predicated upon the passage of that act. (5.) But if it be conceded that the patent to Edwards would not pass the land under water, under the rule applicable to tide water, still we insist that such a rule is not applicable to this case. Whatever might be the rule applicable to our large navigable lakes, or inland seas as they have often been termed, the beds of small lakes and ponds of the size and character of Cazenovia lake would manifestly pass by grants containing them within their boundaries. Cazenovia lake is not navigable, within the meaning of the term as used in the statute. That term is applied to those lakes or inland seas which constitute the great highways of commerce and travel. (1 *R. S.* 208. 17 *Wend.* 621.) But no commerce or travel ever passed over Cazenovia lake, at least in the summer time. It is of the same character as the thousands of lakes which lie so thickly scattered over our state, especially in the northern portions of it, and which may be more appropriately termed

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ponds than lakes. In regard to them, they are not noticed in the lines of lots or townships, and are almost universally included in the computation of the amount of land conveyed or granted. (1 *Wend.* 237. 19 *Barb.* 491.) In the numerous patents and state certificates and comptrollers' deeds of lands in the northern wilderness, which have been issued by the proper authorities, not one, it is presumed, can be found in which these small lakes or natural ponds have not been deemed as passing with the land, and have not been embraced in the computation of quantity. (1 *Wend.* 237. 19 *Barb.* 49.) There is no reason why any restriction should be put upon granting the lands covered by them. Being navigable only in a limited sense, and in nowise constituting highways of commerce and travel, no public docks or wharves are required upon their margins. If the land under our navigable fresh water streams is the subject of private ownership, and passes by grants embracing it within their boundaries, like other lands, no good reason can be shown why the land under these small lakes or ponds should not be subject to like rules. (5 *Wend.* 447. 17 *id.* 621. 20 *id.* 149. 19 *Barb.* 491. 4 *Hill*, 369.) It is therefore submitted, that the title to the bed of that part of the lake contained within the lines of the patent, passed to Edwards the patentee. (6.) If the bed of the lake is vested in the plaintiff, upon its being reclaimed, it of course still continues vested in him, unless it has been appropriated by the state.

III. The land in question has never been appropriated by the state. (1.) Neither of the resolutions introduced appropriates the land in question. (2.) The canal commissioners are the only persons authorized by law to appropriate lands for the use of the canals. The canal board approves the plan, but the canal commissioners make the appropriation. (1 *R. S.* ch. 9, title 9, §§ 16 to 19.) (3.) There is no pretense that any of the formalities necessary to vest the title to the lands of individuals in the state have been observed by the canal commissioners. (4.) Even if it had been their design to ap-

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appropriate the lands to the uses of the canal, the title would not vest in the state until the damages were appraised and paid. (19 *Barb.* 263.)

IV. There was nothing done by the plaintiff during the progress of the work which could create an estoppel. (1.) The mere filling up the space with earth, he did not then nor does he now find fault with. (2.) He said nothing calculated or designed to mislead. (3.) The defendant must be deemed to know the law, and was as well acquainted with all the facts as the plaintiff. He could not therefore be legally misled by the silence of the plaintiff. To constitute an estoppel *in pais* against a party, his conduct must be such as to lead the opposite party into a course of conduct prejudicial to his interest, if the former party be allowed to retract. (8 *Wend.* 483.) The evidence in this case fails to show that the defendant was misled, or that his conduct was influenced in the slightest degree by any thing which the plaintiff said or did. Knowing all the facts of the case, the defendant came to the conclusion that the legal title was either in himself or the state, and acted accordingly. The conduct of the plaintiff had no influence upon his mind in arriving at such conclusion.

V. The plaintiff, therefore, being vested with the title to the land in dispute, was clearly entitled to recover in the action. (1.) The complaint sets out the facts, and alleges title in the plaintiff. He was, therefore, notwithstanding the prayer for relief, entitled to recover the possession of the land in dispute. (*Code*, § 275.) (2.) No question was made upon the trial as to the form of the pleadings. Indeed, all matters of form not affecting the merits were waived by both sides. (3.) The defendant cannot, therefore, object that the relief granted was less than that to which the plaintiff was entitled. (4.) Again, the title to the land being in the plaintiff, if he chooses to leave it open to the public, he has the right to restrain by injunction a trespasser from incumbering it with any thing injurious to himself or the public. (5.) The

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injury being continuous in its nature, the proper remedy is by injunction.

VI. But even if the land in question belonged to the state and was public land, the plaintiff, being a riparian owner, and suffering special injury, has a right to restrain the defendant from taking exclusive possession of the land and erecting and continuing an obstruction to his property and his enjoyment of the lake. (1.) Assuming that the lake, embracing the water and the land underneath, belongs to the public, the whole people have a common right to the use of it for fishing, boating, skating, &c., and any encroachment upon it is a wrong to the public. (5 *Peters*, 431. 12 *Wheat*. 582. 4 *Paige*, 510. 6 *Hill*, 407. 10 *Peters*, 662. 22 *Wend*. 423.) (2.) The lands of the riparian owners are very much enhanced in value in consequence of their proximity to the lake, not only from the facilities which the proprietors enjoy for skating, fishing, boating, &c., but from the beauty of the views and prospects which the lake affords. (3.) The latter consideration enters into the beneficial enjoyment of the lands upon the borders of lakes and other waters, and affects directly and materially the money value of them. Land is affected materially in value by its location, by its proximity to public waters, and by the beauty or grandeur of the surrounding scenery. In the selection of a farm upon which the proprietor designed to reside, thousands of dollars have been paid for that which does not add one iota to its productive qualities, but in consideration of its contiguity to a lake, a river, or a cascade. Many farms have been sold on the Hudson river, and on the many beautiful lakes in the state, for several hundred dollars per acre, which, in other locations with the same fertility of soil, would not bring one-fourth of the money. Mere utility constitutes but a small portion of that which enters into the value of every thing used by man. Beauty often, rather than utility, fixes the standard of value. A horse, a carriage, a building—every thing for the use of man—is materially enhanced in pecuniary value by its adapt-

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ation to please the eye and gratify the taste. Moreover, as a community rises in the scale of civilization and refinement, more and more prominence is given to the beautiful, and less to the merely useful—more is paid for the gratification of the ideal, and less for the gratification of the sensual. Indeed, a fine painting by a master, of the landscape which is destroyed by the defendant, would be valued in dollars by its thousands. (4.) The referee has found in this case that the trees, if permitted to grow, will materially reduce the value of the plaintiff's farm, and the finding is well sustained by the evidence.

VII. The plaintiff suffering special injury from the wrongful acts of the defendant, it is submitted that it comes within the most obvious principles of the jurisdiction of a court of equity, to restrain him from continuing the injury. (1.) The defendant is a wrongdoer and trespasser upon the public property. (2.) His wrongful acts, if continued, will injure materially the property of the plaintiff, lessen its value for sale, and the enjoyment of it while it continues his own. (3.) It is therefore a special injury in consequence of a wrongful act to a public right. It is not perceived why it does not come directly within the cases where an action on the case for damages—when that will afford adequate relief—can be sustained; and when an action for damages will not afford adequate relief, as in this case, a remedy by injunction will be granted. (7 *Cowen*, 609. 8 *Paige*, 351. 9 *id.* 575. 3 *Sandf.* 120.) (4.) Suppose a person, without right, should erect in front of some one of the beautiful residences upon the Hudson river, or upon Otsego or Seneca lakes, a high fence, or some other obstruction, shutting out entirely from the mansion the view of the water, will it be claimed that the proprietor would have no remedy in a court of justice?

VIII. It is also submitted that the principle upon which we claim to sustain the decision of the referee in this case is not new, but is established by repeated adjudications. (1.) In the case of *Corning et al. v. Lawrence*, an injunction was

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granted to restrain a defendant from obstructing a street in the city of New York, by building a house upon it. As there was a special injury to the plaintiffs, by affecting the enjoyment of their property in the vicinity, and the value of it, it was held that the plaintiffs were entitled to the injunction. In *Cady v. Conger*, (19 *N. Y. Rep.* 256,) it was held, that where there was no municipal corporation to assert the general right of the public, an individual proprietor of land fronting on a public green might maintain an action to prevent its perversion from its public uses. The learned judge who gave the opinion of the court, held that where a dedication is made of a public green or park, individuals are invited to build, improve, and make other arrangements of life and business in reference to such public rights; and the rights thus resulting to individuals may be enforced by them. So in the case at bar, if we assume that upon the sale of the lands around this lake, the lake itself was reserved for public uses, the land was purchased with a view to such uses, and no mere trespasser should be allowed to pervert any portion of it from such public uses. (*See also* 22 *Wendell*, 473; 8 *Paige*, 351; 9 *id.* 575; 3 *Sandf.* 126; 4 *id.* 502; 2 *Barb. S. C. R.* 577; 2 *John. Ch.* 162.) In the case of *Cady v. Conger*, it was the view mainly to be affected. That was not so strong a case as this, for in that case there was no direct obstruction to the view, but a building was proposed to be placed upon the green, injuring its appearance. The injury was in nowise as direct as in the case at bar. (2.) If the defendant had kept up a nuisance, even on his own land, offensive to the smell, no one would claim that the plaintiff could not restrain him. It is not perceived why a nuisance offensive to the sight should be treated more tenderly. (8 *Paige*, 351. 9 *id.* 575.) (3.) It is conceded, however, that an action does not lie for placing an obstruction to the prospect of another upon one's own premises. It was so held in a case cited in *Aldred's case*, (9 *Coke*, 57;) still the great value to a home of a fair prospect was there recognized. So



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in *Atty. Gen. v. Doughty*, (2 *Vesey*, sen. 453,) the right to restrain by injunction the obstruction of a prospect, in some cases, is clearly recognized.

CAMPBELL, J. The rights of the parties in this action depend on the decision of the question of ownership of the land on which the defendant planted the trees. The plaintiff claims that the title is in him, or if not in him, then in the people of the state. The defendant insists that he is the owner, and as such had perfect right to use it as he has done, and to plant trees thereon, even though in their future growth they should in some degree obstruct the plaintiff's view of that beautiful lake of Cazenovia. This lake is about five miles long, and three-fourths of a mile wide, has no current and no main inlet. The land lying along its shores is mostly improved, and used as farming land. Elegant mansions have been erected, and the region of country is healthy and beautiful. But this lake, in my judgment, is in no legal or just sense of the term navigable water. It is not, in the language of Lord Hale, a highway "for a man, or goods, or both, from one inland town to another." It is too small to be of any practical use in navigation, except it were as a connecting link of some internal improvement. The state took no notice of its existence in the patent granted to Edwards. The northern line of that patent crossed the lake north of the land in dispute, and this land was embraced within the boundaries of the grant. There is no restriction or exception of the lake, no reference to it, no reservation of the water or land under water. The grant under that patent carried the southern portion of this lake as completely to Edwards as the patent to Zephaniah Platt passed to him the title to a portion of the Saranac river. (*See People v. Platt*, 17 *John*. 195.) The defendant derives his title remotely from John Linklaen, one of the grantees of Edwards the patentee, and his premises, in that deed, dated in 1804, as well as in the subsequent deeds, are bounded on the west and south by the lake and



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outlet thereof. Under these deeds the premises of the defendant have been held and possessed, and for nearly forty years past by the defendant and his father. Under these deeds the title of the defendant extends "*usque ad medium filum aquæ*." It was not a *limited grant*. The premises of the defendant are not bounded on the west by the *bank* of the lake, but are bounded by the lake itself. There is no intent manifested on the face of the deed of the grantor to restrict his grant. The deed would have the usual legal effect, and as an appurtenance would carry along the land under water to the center ; at all events it would carry the right to the land filled in, where the water was shallow, immediately in front of the defendant's premises. (*See opinion of Walworth, chancellor, as to boundaries, Canal Appraisers v. The People, 17 Wend. 599.*) In my judgment, under this view of the case, the defendant is the unqualified legal owner of the premises.

But taking another view, and assuming that this lake is navigable water, and that the title to the land under water did not pass under the patent to Edwards, but was reserved by the state, then how stands this action ? In such cases, how does the state hold the title where it has sold and conveyed away all the land bounded by the lake or river, and where the riparian proprietors stand face to face with their feet touching the outer edge of the water ? "It is," says Chancellor Kent, (3 *Com. 545, 9th ed.*) "a settled principle in the English law, that the right of soil of owners of land bounded by the sea or on navigable rivers, where the tide ebbs and flows, extends to high water mark ; and the shore below common but not extraordinary high water mark belongs to the state as *trustee* for the public." It may be added that in New York, the state long ago, and immediately after the revolutionary war, declared herself also a *trustee* for the owner of the adjacent lands. By our present statute the commissioners of the land office may grant land under navigable lakes and rivers, when necessary for commerce or proper

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for the purpose of beneficial enjoyment of the same by the adjacent owner; "but no such grant shall be made to any person other than the proprietor of the adjacent lands, and any such grant that shall be made to any other person shall be void." (1 *R. S.* 5th ed. 552.) The state then is trustee for the public of the land under water in navigable lakes and rivers, so as to protect navigation and prevent hindrances or obstructions; on the other hand she declares herself trustee for the riparian proprietor, and that grants are to be made to him alone, and that they will be made not only for purposes of commerce, but when proper for the beneficial enjoyment of his adjacent lands. Then when the proper and constituted authorities of the state proceeded to deepen the outlet of the lake, and deposited the stones and earth that were removed, in the shallow water in front of and adjacent to the defendant's premises, it was a visible and public declaration that this portion of the lake could no longer be used for navigation. The defendant entered into possession, and the trusteeship of the state, both for the public and the riparian proprietor, was virtually at an end. It is true that no formal grant was made to the defendant. But the land became eminently proper, and not only proper but necessary, for the beneficial enjoyment of his adjacent premises. There arose, if not a legal at least a strong equitable title, which, coupled with actual possession, no one except the state herself should be allowed to dispute. I cannot agree with the able and learned referee who tried this case, that the land remained a highway. Under the civil law it is very likely it would have been so, but not under the common law. "In the civil law the banks of public rivers, and the sea shore, were held to be public." (3 *Kent's Com.* 543.) At this day, men and horses may be seen on the banks of the Rhine towing boats up its oft rapid waters, following in paths which have been thus trod for ages, and protected under customs and laws which had their origin in remote centuries, when, before the Christian era, the legions of Julius Cæsar pitched their tents, and

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built their towns, and flaunted the victorious Roman eagles in the vallies and on the hills which adjoin and bound that beautiful river. But such was not the common law, either in England or in this state. The public here have no highway along the margin of our navigable rivers and lakes, unless the same has been acquired by express grant or prescription. In any view of this case which I have been able to take, the plaintiff cannot maintain this action. If the defendant is the legal owner of the land, the plaintiff is remediless; if he is the equitable owner in possession, then no stranger can interfere with him.

good stuff!

This action is brought on what may be termed the equity side of the court. The planting of the trees, and obstructing the plaintiff's view of the lake, may not be neighborly. Of this I have no knowledge. Whether it is necessary or desirable for the protection of the defendant's property, or for its better enjoyment, does not appear. These matters we cannot regulate. In my opinion the judgment must be reversed, with costs to abide the event,

PARKER, J. concurred.

BALCOM, J. dissented.

[BROOME GENERAL TERM, January 28, 1862. *Balcom, Campbell and Parker, Justices.*]

**RAYNOR and others, *appellants*, vs. ROBINSON and others,  
*respondents*.**

J. R., the son and administrator of D. R. deceased, presented a petition to the surrogate, alleging that D. R. was indebted to him, in his lifetime, and at the time of his death, in the sum of \$8000, for work and labor, and also for cutting and drawing fire wood for the use of the wife of the intestate, (the mother of J. R.,) and for supplying her with vegetables and waiting and attending upon her necessities during a period of 25 years; she during that time living alone and being deserted by her husband; that such services were rendered, and the labor performed, under the expectation and upon the promise of the intestate that he would devise to J. R. his homestead farm, and certain meadow land; that D. R. died intestate leaving other persons besides the petitioner, entitled to share the lands. The petitioner prayed that he might be allowed to prove his claim, and retain the amount thereof out of the personal estate in his hands. It appeared upon the hearing that the services were rendered during a period of more than 25 years; that no account had ever been kept of what was done; of who did it; or of what was furnished; or of the time when. And no account was ever rendered to D. R. in his lifetime; and there was nothing to show that he was ever aware that he was under any obligation to compensate J. R. by a devise of the land.

*Held* that the presentation of such a demand, for the first time, after the decease of D. R., was calculated to awaken some suspicion as to its validity, and to demand clear and unequivocal evidence of its truth.

That nothing short of this would satisfy the simplest demands of justice and good faith.

That to justify the allowance of the claim, it was indispensable that the proof should establish a contract to pay for the services rendered to the wife of D. R. by a devise of the land. That it could not be upheld upon any other ground; and if the proof fell short of establishing such a contract, or a mutual understanding to that effect, that the claim could not be allowed: 1. Because such was the claim in the petition of J. R., which alleged a special contract to pay for the services by a devise of the land; 2. If there was no special contract, or mutual understanding, to make compensation in a particular way, and at a future time, to wit, by a devise of the lands to take effect upon the death of the promisor, then the remuneration for the services was payable presently, and the claim, or most of it, was barred by the statute of limitations.

Loose declarations of an intestate that he intended his son should have the farm of the former; that it would all be his (the son's;) and that he intended to give it to the son; *held* insufficient to authorize the court to infer an *agreement*, on the part of the intestate, to devise the farm to the son, as a remuneration for personal services.

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**A** PPEAL from a decree of the surrogate of the county of Suffolk, allowing the claim of Jonathan Robinson against the estate of David Robinson, deceased, for personal services, to the amount of \$1250.

*William Wickham*, for the appellants.

*George Miller*, for the respondents.

*By the Court*, BROWN, J. Jonathan Robinson, the respondent, is one of the administrators of his late father, David Robinson, deceased, and as such, presented his petition to the surrogate of the county of Suffolk, alleging that the intestate was justly indebted to him in his lifetime, and at the time of his death, in the sum of \$3000, for work and labor, and also for cutting and hauling wood and cutting it up at the door, and carrying it into the house, for the use of the wife of the intestate, (the mother of the respondent,) and for supplying her with vegetables and waiting and attending upon her necessities during a period of 25 years, she during that time living alone and being deserted by her husband. That such services were rendered, and the labor performed, under the expectation and upon the promise of the intestate that he would devise to the respondent Jonathan Robinson his homestead farm of the value of \$4000, and a tract of meadow of the value of \$600, upon Moriche's Island, in the county of Suffolk. That he died intestate seised of the said farm and lands, leaving other persons entitled to share the lands, as well as himself. He prayed for the usual process, to the end that he might prove his claim and retain the amount thereof out of the personal estate in his hands. At the return day of the citation the children and next of kin appeared before the surrogate and denied the existence of the claim, and also set up the statute of limitations as a bar to the recovery thereof. Testimony was taken and the cause heard at length by the surrogate, who made his decree awarding the peti-

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tioner \$50 a year for 25 years' services (\$1250 in all) rendered the father and mother, upon the ground that it was mutually understood the son should receive compensation by a devise of the homestead farm.

The proof shows that the farm consisted of 500 or 600 acres of land with 50 or 60 acres cleared, the residue being in wood. That the respondent Jonathan Robinson had the use of it during the period, or for a large part of the period of time for which the services were claimed. The father and mother lived in a state of separation; she occupying a small dwelling house upon the farm, about 80 rods from the residence of the respondent; her children, I assume, having married and moved away. How or where the husband lived, in the meantime, does not exactly appear, further than that he remained in the same neighborhood, and was occasionally at his son's. The services and necessities furnished the mother consisted of cutting and preparing fuel for her fire by some of the sons of the respondent. Some one of the respondent's daughters also milking the cow and baking and washing for her, while one of the sons usually slept in the house at night. Similar services were also sometimes rendered her by her married daughters. She was furnished from time to time with some garden vegetables for her table, and a few quarts of corn, occasionally, to feed 10 or 12 fowls which she kept around her house. The respondent says he once bought a barrel of flour for her, and paid for it, and bought her necessities a number of times at the stores for her, and paid for them himself. It also appears that during the time, he cut from the farm or land of the intestate cord-wood, from time to time, which the respondent says he paid him for. There was also some slight evidence that he did some business for his father, but what it was does not appear. Indeed the father seems to have had no business of any consequence, and the surrogate, in rendering his decree, seems very properly to have regarded this part of the case as of no moment, and the services of little or no value. The claim, in its most favora-

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ble aspect, is certainly a very novel one, attended by circumstances unusual, if not in some respects unnatural. For the services were those acts of kindness and affectionate regard which most sons would have been happy to have rendered to an aged and lone mother. Besides, they were for the most part the services of her grandchildren, the respondent's sons and daughters, and it is said, in the testimony, the intestate never paid them any thing. In the absence of an express promise, it would be difficult to imply an assumpsit from acts performed under such circumstances. (*Williams v. Hutchinson*, 3 Cowen, 312.) But this is not all. The services were rendered during a period of more than 25 years. No account was ever kept of what was done, of who did it, or of what was furnished, or of the time when. No account was ever rendered to the intestate in his life, and there is nothing to show he was ever aware that he was under any duty or obligation whatever to compensate his son for these things by a devise of the farm. The presentation of such a demand, for the first time, after the decease of the alleged debtor, and when his lips are forever closed against all defense and explanation, is calculated to awaken some suspicion as to its validity, and to demand clear and unequivocal evidence of its truth. Nothing short of this will satisfy the simplest demands of justice and good faith. The courts have gone quite far enough in favor of this class of claims—farther, I think, than can be justified by reason or strict legal principles. To sustain the decree made by the surrogate, it is indispensable that the proof should establish a contract to pay for the services rendered the mother, by a devise of the land. It cannot be upheld upon any other ground, and if the proof falls short of establishing such a contract, or a mutual understanding to that effect, the claim, or the principal part of it, must fall to the ground. (*Martin v. Wright's Adm'rs*, 13 Wend. 460, and the cases there referred to.) Because, 1st. Such is the claim in the petition of the respondent. He alleges a special contract to pay by a devise of the farm, and

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although upon the failure to devise by will, the amount of the recovery is to be measured as in an action upon a quantum meruit, still the foundation of the recovery is the special contract and its subsequent breach. 2d. If there was no special contract, or mutual understanding, to make compensation in a given way, and at a future time, to wit, by the devise of the lands to take effect upon the death of the bargainor or party contracting to make the devise, then the remuneration for the services was payable presently, and the claim, or the most part of it, is barred by the statute of limitations. The contract—a valid subsisting contract—to make the devise of the farm in consideration of the services rendered, must be made out affirmatively by the proof, or the decree cannot be upheld.

It is another circumstance worthy of notice, that no witness was examined who was present when any such agreement was made. It is not pretended that it was reduced to writing, and no one ever heard the parties engaged in any treaty concerning it. If it exists, it is to be inferred from the declarations of the intestate proved upon the hearing. The times at which most of these declarations were made are not given. If they were made after most of the pretended services were rendered, and towards the close of the intestate's life, their effect to make out the agreement would be materially diminished. I now proceed to ascertain what they are. David Robinson, a son of the respondent, heard his grandfather, after telling him, the witness, to take good care of things, say, "it would soon all be father's; I intend to give it to your father, and it will eventually be yours and your brothers. This he said in relation to keeping cattle off the sprouts. I have heard him say father, when he had the farm, would have enough to pay him for his work he had done for him—services he had performed." Lester Robinson, another son of the respondent, testified: "I had a conversation with my grandfather about working there, a great many times; he never paid me; said my father would have



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the place for the labor he was performing ; told me that, a great many times ; told me, a great many times, he had willed it to my father ; told me he would certainly have the place." Clark Robinson, another son of the respondent, after describing the work done and manure put by his father upon the farm, said : "I have talked with my grandfather about this work and the pay for it. The last time I saw him, before he died, he told me he should give father the home place." Joel Robinson, a witness for the respondent, proved the fact of the intestate having made several wills, in which he gave the homestead farm to the respondent, one of which he destroyed in the witness' presence, a short time, four or six months, before his death. "Heard him say he meant Jonathan should have the homestead : this was when he came to have the writing done." Beulah Terry, a daughter of the respondent, "heard him (grandfather) say he would pay us for all what we had done ; and that he would give father the place from the south end to the Peconic river and meadow." Esther Benjamin, another daughter of the respondent, heard her grandfather say, "We should all be paid for what we had done. He should give us the home place and the meadow." It was also proved, that upon one occasion the old gentleman said to the respondent, "that some of the girls wanted him to get a receipt from him, or he would bring in a bill of \$3000, and get it, and the respondent replied, he would not give the receipt unless the intestate gave him a deed." This is substantially the testimony on the part of the respondent, with the exception of his own evidence, to which I shall refer, presently. It proves the recognition by the intestate of some services rendered and expenses incurred by the respondent, for which he was entitled to some remuneration ; and they are also evidence of an intention to devise the farm to him by will. But they come very far short of proving a contract upon the faith of which the services were rendered and the necessities furnished, by which the intestate was bound

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to devise the farm with the meadow land to the respondent as a remuneration therefor.

Evidence was given on the part of the appellants which must not be overlooked. John Raynor heard David Robinson, the intestate, say to Jonathan, the respondent, "he had made proposals if he would do so and so, he could occupy a portion of the place. He was to take care of his mother and pay the rates. He said, if you don't do it I shall use other means. Jonathan made no reply. This was 15 years ago." Ruth Raynor testified to the same fact, with this addition, that David said, "when there is a barrel of flour wanted I have got it, and when there is fish wanted I have got that." It is to be remembered, in this connection, that a single barrel of flour is all Jonathan claims to have furnished his mother during the entire 25 years. Bouker Robinson, a witness, "was present at a conversation between Jonathan and the old man, who said to Jonathan he believed he had a bill against him, and if he had he wanted to know it. Jonathan said a number of times over he hadn't any claims, and father (the old gentleman) said he had agreed to support the old lady and pay the taxes on the place, and if he had any charges against him he wanted to know it. Jonathan made no reply." Similar testimony was given by other witnesses. Jonathan Dayton, another witness, had a conversation with Jonathan less than a year before the old man's death, when he told him the old man had destroyed his will. He says, "I told him I heard he had a bill against the old man for \$3000, and when the old man died he intended to fetch it in. He said it was as big a lie as ever was told. They were making all this up to hinder the old man from giving me his property." At this stage of the case the respondent recalled David Robinson, and as his evidence corroborates that of the respondent himself, I will quote a part of it. "Father," he says, "bought 3000 bushels of ashes and put on the farm. All the farming he ever did there did not pay expenses. He told grandfather he did not want to stay there, and grand-

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father promised to give him the place, and said if you stay here a few years longer the place will be yours." In substance, the testimony of the respondent is to the same effect. After stating the one barrel of flour he furnished his mother, and some necessities bought at the store, and the services of his daughters and sons to their grandmother, he says: "I never knew my father make any compensation to my children for their services. Father cultivated the best portion of the farm. After he went over the river, he never purchased any ashes; the lots he put his yard manure on. He cropped them until he cropped them all out, and then gave it up to me, and told me if I would manure it I might have the crop. He said if I would stay there I should have the farm. Said the girls shouldn't have a foot of it; and when they persuaded him to destroy his last will he repeated it, and said he would give it to me. I told him he was an old man, and he ought to make his will. He said he would. He told me to go to Joel's and get the will written. I said no, he must go, and could have one of the boys." He says he did his father's business for thirty years, but does not say what it was; and makes complaint that he expended money for manure put upon the farm which he never realized by any adequate return. What is worthy of note in his evidence is, that he mentions no contract or agreement or understanding by which he was to have the farm for the services rendered and articles furnished his mother. He does not refer to any language or conversation with his father from which we can infer a promise to devise the farm as a compensation for what he had done. But, on the other hand, he says his father told him if he would manure the farm and stay there he should have it, and the girls should not have a foot of it. I have said I thought it hardly possible to infer an obligation on the part of the father from the nature of the services rendered by the son and his children to his mother; and I think it still more difficult to infer any agreement to devise the farm as a remuneration for those services, from the loose declarations of the

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intestate that he intended Jonathan should have the farm, that it would all be his, and he intended to give it to him; because Jonathan was his only son, and the most likely person of all others to whom he would give the land, and such a disposition of it was natural and reasonable, and the declarations imply nothing more than an intention to make his son the special object of his bounty, by a devise of the farm, which was already in his possession.

Without pursuing the inquiry farther, I conclude that the evidence is insufficient to make out the contract set out in the petition of the respondent, and if he has rendered any services, or furnished any supplies to his mother, for which he is entitled to recover upon an implied assumpsit, his recovery must be limited to such as were rendered and furnished within six years next before the death of the intestate.

The decree of the surrogate should be reversed.

[KINGS GENERAL TERM, February 10, 1862. *Emott, Brown and Scrugham, Justices.*]

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**DUNHAM and BEACH vs. WILLIAMS and PARKER.**

Where the language of an act of the legislature, incorporating a turnpike company, is such as to vest the title to the land over which the road passes, in the company, it must nevertheless be considered as vested only for the purposes of the road; and when the road is abandoned, the land reverts to the original owners.

Where premises conveyed by deed were bounded easterly by a road or public highway, without any words indicating an intention to limit the eastern boundary to the westerly line of the road; *Held* that the words of the grant included, by fair interpretation, the one half of the road bed.

And where the grantees, and those claiming under them, had been in the actual possession of the lands adjoining the road, under such a deed of conveyance, subject to the public easement of the highway, for more than 70 years; *it was held* that they were in the constructive if not the actual possession of the western half of the road bed, sufficiently to enable them to maintain trespass or ejectment.

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The Brooklyn, Jamaica and Flatbush turnpike company did not acquire, and had no authority to acquire, under their act of incorporation, any other estate in the lands taken for their road, than an incorporeal hereditament, or right of passage.

**A**CTION of ejectment, involving the title to land forming part of the road bed of the Brooklyn, Jamaica and Flatbush turnpike road, running from the Brooklyn (Fulton) ferry to Flatbush, and branching beyond the premises in question to Jamaica. The *locus in quo* constituted a piece of the road between its western side and centre line, near Hanson place, within the present limits of the city of Brooklyn. The defendant Williams claimed as grantee from the turnpike company; the plaintiffs, as being the owners of the adjoining premises. The plaintiffs offered evidence tending to establish that, before 1808, one George Powers was in possession of a farm of land embracing premises on the westerly side of and adjoining, and bounded on the east by, the road in question, which were conveyed to him by deeds from persons claiming from one Michael Bergen, dated May 11th, 1787, and recorded June 14th, 1808, and that by deeds and devise from George Powers of premises described as bounded by the road, or including any interest in it, they had become possessed of the adjoining premises, for convenience called the "Powers farm;" that the road had been five or six years before the trial discontinued for general travel, and that some two years before, the defendants had fenced in and occupied the premises in question. For the defendants, by their own evidence and that of the plaintiffs, the following facts appeared: The Powers farm was originally granted by the Dutch governor William Kieft, on behalf of their high mightinesses the lords states general of the United Netherlands, &c. (the Dutch government) by patent dated February 22d, 1646, to one Huyck Aertsen Van Rossum, whose patent was confirmed by the English governor Richard Nicholls, June 21st, 1667, to Albert Cornelissen, the next proprietor under Van Rossum's patent, from whom the title was transmitted

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to Michael Bergen, mentioned in the plaintiff's evidence. Before 1646, and at least twenty years before the Dutch surrendered their New Netherlands colony to the English, in 1664, the road in question, opposite the Powers farm, identical with the road as last in existence, had been laid out, and was in use as such; it appearing that it had been from the earliest settlement of the country the road between Brooklyn and Flatbush, which was settled as early as 1634, and Flatlands settled in 1636; and that in fact it had been an old Indian path before it became a highway. It is mentioned in patents from Governor Stuyvesant to premises on either side of and near the Powers farm, as early as 1654, 1655, 1656 and 1658, as the "great road," "the public highway," and "the highway." In 1654, the Dutch church at Flatbush, in 1662, that at Flatlands, and in 1666, that at Brooklyn, were built all on and with reference to this road, which was used till their churches were built, by the people of Flatlands and Brooklyn, in going to and returning from church at Flatbush, which, until 1786, when Brooklyn took its place, was the county town of and most considerable place in Kings county, having at that time less inhabitants than in 1664. This road was the only avenue of which there is any tradition or history during all the years referred to, for the travel made necessary by the importance of Flatbush, between the ferry to New York and Flatlands, and the lower end of Kings county on the one hand, and in fact Jamaica and the upper end on the other. In 1709, as appears by an entry dated March 28th, 1709, in the road record book of Kings county, (made evidence by section 6 of the act of April 2d, 1801, Brooklyn laws, p. 53, appendix, Furman,) under an act of the colonial legislature, passed May 6th, 1691, (*Van Schaick*, p. 3,) permitting the commissioners therein provided to "lay out, *set forth*, regulate and amend highways," &c., the road was recorded as a public common highway, "as the way is now in use," four rods wide, the width at all times till it ceased to be a road. It is again

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recognized in an act passed July 27th, 1721, (*Van Schaick*, p. 125,) as having been as it then was for over sixty years; is laid down on Lieut. Ratzer's map, from surveys made in 1766 and 1767; and in 1804 or 1805, and again in 1810 or 1811, was surveyed by Jeremiah Lott, examined as a witness for the plaintiffs. On March 17th, 1809, was incorporated the Brooklyn, Jamaica and Flatbush Turnpike Company, which laid out, and thence used and occupied the road authorized by their act directly over the old highway at the place in question, Mr. Lott making the necessary surveys; and on August 1st, 1809, by inquisition then taken, the appraisers appointed in pursuance of the act for the highway, found by them as taken and appropriated by the company, awarded as damages \$100 to the town of Brooklyn, and \$50 to the town of Flatbush, as being the owners of the land. On April 25th, 1832, was incorporated the Brooklyn and Jamaica Rail Road Company, by act of the legislature (*Laws of 1832*, p. 453) of that date, permitting and requiring the company (section 27) to purchase, and in pursuance of which they did, by deed dated August 2d, 1833, and recorded September 10th, 1835, purchase the road in question. That company, by acts of May 13th, 1846, (*Laws of 1846*, p. 441,) and April 12th, 1848, (*Laws of 1848*, p. 489,) were permitted to sell the property so purchased, including the road, and did grant the part embracing the premises in question to the defendant Williams' grantors by deed dated May 3d, 1853, recorded June 10th, 1853. The act of 1846 (section 17) in terms provided that the parts of the road granted, as by it permitted, should "belong absolutely to the purchasers or grantees thereof." The defendants also proved the capitulation and surrender by the Dutch to the English on August 27th, 1664, and their return and possession, till their final expulsion in 1667; that on October 18th, 1667, Governor Nicholls gave a patent or charter, confirmed May 13th, 1686, by Governor Dongan to the freeholders of Brooklyn, whereby he granted to them the tract of land embracing the

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town, describing its limits, including, as shown by the confirmatory patent, "all highways," &c.; and that up to and after 1692, the common lands of the town of Brooklyn bounded the road in question on the east, and doubtless embraced it, the road having been in existence before any grants were made of land on either side of the road, and neither the grant of the Powers farm or others embracing any part of the road. The action was tried at the circuit in Kings county in November, 1860, before Justice EMOTT and a jury. At the close of the testimony, the judge directed the jury to render a verdict for the plaintiffs. The jury found a verdict accordingly; and the court ordered the exceptions taken at the trial to be heard in the first instance at the general term. The defendants appealed.

*J. E. Parsons*, for the appellants. I. Proof of title to premises bounded by a road is not conclusive evidence of, but merely affords the presumption of title to the soil, *usque ad filum viæ*. When a road runs through a man's land, *prima facie*, the fee of the land over which the road runs belongs to him, for the reason that the road is presumed to exist either by use, with the license of the owner, in which case the public acquire, by prescription, a mere right of passage, or to have been opened under the provisions of a statute permitting to be taken merely such right of way. (*Gidney v. Earl*, 12 *Wend.* 98.) Possession of the adjoining premises is by no means tantamount to actual possession of the road bed. Such possession could never, coupled with a claim of title adverse to the claim of title of the public, road commissioners, the town, or a road corporation in possession and use of the road bed as a road, constitute title by adverse possession; on the contrary, title to the road bed in an adjoining owner would be defeated by adverse possession for a sufficient length of time, by one using for purposes other than mere right of way. (*Read v. Leeds*, 19 *Conn. R.* 182. *Etz v. Daily*, 20 *Barb.* 32.) It is as necessary for the plaintiff in ejectment to prove title



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where the premises are in the bed of a road, as to any other premises. The fee of a road bed is not an incident to the adjoining land, and will not pass with a grant merely of such land. To pass the title to the soil of the road, words of description must be used which, in contemplation of law, embrace and include it. The fee of one piece of land not mentioned in a deed cannot pass as appurtenant to another. (*Jackson v. Hathaway*, 15 John. 447. *Witter v. Harvey*, 1 McCord, 67. *Tyler v. Hammond*, 11 Pick. 194.) And so, though in contemplation of law, possession of adjoining premises presumes possession of the road bed, and possession, title, such proof of title by a plaintiff in ejectment will be defeated by proof, that a former owner of road bed and adjoining premises, in granting the adjoining premises, used words of description which are not construed to include the road. (*Jackson v. Hathaway*, *supra*. *Child v. Starr*, 4 Hill, 373.) A claim of title, therefore, to the soil of a road, resting, as in this case, on mere proof of possession of adjoining premises (in George Powers) as *prima facie* evidence of title, will be defeated by proof of better possession in another, or by overcoming either of the presumptions from which the doctrine springs: *i. e.* proving that the road was not opened over land at the time forming part of the adjoining close, or that the statute under which the road was opened provided that the fee of the road bed should be taken. (*Wetmore v. Story*, 3 Abbott, 277. *Storer v. Freeman*, 6 Mass. Rep. 435. *Hatch v. Dwight*, 17 *id.* 298. *Bartow v. Draper*, 5 Duer, 130.) An adjoining owner, as such, acquires no interest in the road bed; he merely retains his original title, if any. The road ceasing, his title, if any, remains discharged of the right of passage; of course he takes nothing where, as here, he, or those through whom he claims, parted with nothing for the road. (*Willoughby v. Jenks*, 20 Wend. 98.)

II. The common source of title to the premises in question and the adjoining premises, was the Dutch government;

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(*Denton v. Jackson*, 2 John. Ch. 324; *North Hempstead v. Hempstead*, 2 Wend. 110;) which granted a patent for the Powers farm in 1646, at which time the premises in question were in use as a highway. The civil law prevailed in the Netherlands and their colonies at that time. (*Hoffman's Treatise on the Corp.* p. 258. *Encyclopedie Raisonnee*, tit. Droit. 1 *Brown's Civil Law*, 7. 1 *Blackstone's Com.* 15. 1 *Kent's Com.* 515, n. c, 516, 543. *Cortelyou v. Van Brundt*, 2 John. 359, 363. *Wetmore v. Story*, 3 Abbott, 280, argument of C. O'Connor, Esq. *Van Leuwen's Com. on the Roman Dutch law*, Eng. ed., 1820, preface.) And under the rule of the civil law, the sovereign or government was always the absolute owner of the soil of highways; the title of the adjoining owner was always absolutely divested where a road was opened over private premises. (3 *Kent's Com.* 526. *Traite des Servitudes*, 648, 649. *Delalure des Servitudes*, 529, n. 648. *Partida*, 3, 28, 6. 1 *Denisart*, 354, verbo *Chemin*, art. 5. *Metwinger v. The Mayor &c.*, 3 Mart. 303. 1 *Gibbon's Decline and Fall*, 66, Lon. ed. 1838.) See *Renthrop v. Bourg*, (4 *Martin's La. Rep.* 97,) citing *Digest*, lib. 43, tit. 8, Law 2, § 21, as follows: "Translated literally," says Judge Martin, "we call a public road that of which even the soil is public. We do not take it to be in a public road as in a private one, the soil of which belongs to another, while we have only the right of walking or driving over it." The soil of a public road is public. The fact of ownership in the Dutch government of road bed and adjoining premises when was granted the patent of 1646, does not show that in making such grant the government intended to vest in the patentee any right in the soil of the road. 1. The words of the description of the grant do not include any part of, or interest in the bed of the road, directly or by implication, which would be necessary to pass it under the common law; but exclude the idea that any thing was granted in which any right or interest was reserved. Grants of things public are never presumed. Such grants are construed most strongly

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in favor of the grantor. (*Domat*, vol. 1, lib. 1, tit. 1, § 2, art. 17. 2 *Black. Com.* 347. *Palmer v. Hicks*, 6 *John.* 133. *Lansing v. Smith*, 4 *Wend.* 23.) 2. The grant is to be construed and governed by the civil law under which it was made, and by which, as just shown, the fee of the road was always in the government. *Renthup v. Bourg* was a much weaker case than this. The state patented to the plaintiff's grantors premises, *including land*, subsequently laid out and used as a road, and afterwards by act, making no provision for compensation, appropriated it as a highway, upon which the defendant built a ferry house. Held, in the language of the head note, "the soil of a highway is public property, and cannot be recovered in an action between individuals." Judgment of district court affirmed, and a motion for a rehearing, argued at great length by Edward Livingston, refused. (4 *Mart.* 168.) Nor can it be contended that the interest of the public was only a qualified fee of such character, that on closing the road the soil would pass to the adjoining owner. (4 *Merlin's Rep. Jur.* 188, ed. of 1825, *Brussels*, tit. *Chemin Public*.) The sovereign power would equally have become the owner in fee to any part of the road laid out over the Powers farm, after its original grant by the Dutch governor. The patentee took, subject to the application of this doctrine of the civil law, and held in subordination to it. He is presumed, in paying for his patent, to have estimated for this sovereign right to appropriate, in fee, soil needed for a highway—took by his patent so much less—and this reserved right passed, on the surrender, to the English crown, without being divested by the accession of the common law. (*Hoffman*, 257, 265, 268, 291, 295.) The difference between the rule of the civil and that of the common law has always been recognized, followed and affirmed by all legislation in respect to roads affecting the portions of the state settled by the Dutch, pre-eminent among which is Kings county. This will appear by a comparison of the various highway acts of the state, with all special turnpike

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company charters, part of the case. (*Jenkins v. Union Turnpike Co.*, 1 *Caines' Cases*, 93.) Those specially applicable to Kings, Queens and Suffolk counties, using language which will be shown to authorize the acquisition of the fee, while the acts providing for roads in other portions of the state merely provide for taking a right of way. The first general act relating to highways, was passed May 6th, 1691. (*Van Schaick*, p. 3.) It is very brief and indefinite, applicable to existing roads, not intended to provide for taking land for roads, as sufficiently appears by its title, "An act for enabling each respective town within this province to regulate their fences and highways, and make prudential orders for their peace and orderly improvements." On July 17, 1721, (*Van Schaick*, 126, ed. *Colonial Laws*, 1726, p. 207,) was passed a more comprehensive act, providing specially for highways in various places, appointing commissioners by name in many towns, and as to Kings and Queens counties, specially directing how lands may be acquired for roads. If less than ten wish the road, they, and if more than ten, the town shall "pay and satisfy the owner or owners through whose land such road or highway is laid out \* \* \* *the true value thereof*, according as it shall be adjudged," &c., instead of damages sustained by the owners as provided in respect to roads in the English portions of the state. This act was continued as to Kings and Queens counties by acts of October 29, 1730, (*Van Schaick*, 156,) October 14, 1732, (*Id.* 169,) November 17, 1739, (*Id.* 206,) which finally merged in the act of November 29, 1745, (*Id.* 262.) "An act for \* \* \* regulating and further laying out public &c. highways in Kings county." Commissioners are to be elected who may lay out roads, but not through private lands "without the consent of the owner of the lands, or paying the true value of the lands so laid out." And those for the rest of the state, in the act of March 21, 1797, (3 *Greenl.* 406,) "An act to regulate highways," &c. Section 1, as the preceding intermediate acts, excepts Kings, Queens and Suffolk.

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Where a road is laid out under it through private lands, it is provided, following the rule of the common law, as the preceding acts applicable to other parts of the state, "that the owner or owners shall be paid such damages as such owner or owners may sustain by reason thereof." In 1789, by act of February 2d, (2 *Greenl.* 222,) the act of 1745, in reference to Kings, Queens and Suffolk, was somewhat modified and re-enacted with the provision still retained, (section 1,) that it shall not be lawful "for the said commissioners, or any of them, to lay out any road through any person's land without either the consent of the owner thereof, or paying him the true value of the land so laid out into a highway or road," explained and strengthened in the view for which the defendants contend, by adding, "with such damages as he shall sustain thereby;" and by this act the commissioners are empowered to exchange in certain cases land used for roads, for other lands to be similarly used, the person thus obtaining the disused road bed "to hold and enjoy the same to him, his heirs and assigns forever." In 1801, at the same session of the legislature, were passed two acts, in slight respects modifying the above; one on April 2d, (2 *Kent & Rad.* 191,) in reference to Kings, Queens and Suffolk, and the other on April 8th, (1 *id.* 588,) excepting those counties. By the former, (section 1,) the owner of land taken is to have "the true value of the land, with such damages," &c., as in the act of 1789, while by the latter, (section 15,) as in the act of 1797, he merely receives the damages sustained. So on April 2d, 1813, was passed an "act to regulate, &c. highways in Kings, Queens and Suffolk," &c., (2 *R. L.* 304,) revising and re-enacting the preceding act; though on March 19, 1813, at the same session (*Id.* 270) the general act was also passed, providing that where a road shall be laid through private lands, "the owner or owners shall be paid such damage as such owner or owners may sustain;" the act for Kings, &c. in the similar case, providing (section 3) that such road shall not be so laid out

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“without either the consent of the owner thereof, or paying him the true value of the land so laid out into a highway, and such damage as he shall sustain thereby.” Section 1 of the latter act permits the road commissioners to close roads in their discretion, as also does act of 1835, (*Laws of 1835*, p. 136,) and proceeds: “And the said commissioners are hereby authorized to sell and convey all such roads as they shall think proper to close or shut up, and shall offer the land contained in such road at three-fourths the true value thereof (according to their best judgment) to the person or persons who may own the land adjoining; and if such person or persons refuse to purchase the land contained in such closed road at such estimate, the commissioners may dispose of it to any other person or persons at the same or a higher valuation;” with a proviso pointing to the very distinction claimed, that roads which have become public highways by twenty years’ use before March 21st, 1797, and are not recorded as was this one, (roads by prescription merely,) shall revert, &c. The provision of the act of 1789, for an exchange of road bed, is also retained. By an act passed April 11th, 1808, (*5 Kent & Rad.* 386,) amending the general act of 1801, and specially excepting Kings, Queens and Suffolk, a similar power (section 1) is given to road commissioners to close roads; no provision being made for the land, which is left to take care of itself, of course, on the idea that it reverted. The rule of the common law has not been invariably followed in England, it appearing that in certain cases, even there, parliament gave and exercised the right to sell an old highway when closed. (*Statute 13 Geo. 3, ch. 78, § 17. Woolrych on Ways*, 60.) This statute, by the constitution of 1777, became a law of the state. (*1 Kent’s Com.* 524.)

III. The power of the legislature, in the exercise of its right of eminent domain, to permit a title in fee to be taken from private individuals for public purposes, is well established. The only question which arises is whether, in a given case, the language of the grant of power manifests an inten-

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tion in the legislature to permit a fee to be taken. So held as to the canals. (*Baker v. Johnson*, 2 *Hill*, 342, 348. *The People v. Hayden*, 6 *id.* 359. *Rexford v. Knight*, 15 *Barb.* 643.) So held as to land taken for Bellevue hospital. (*Heyward v. The Mayor &c.*, 3 *Seld.* 314.) For markets. (*Laws of 1816*, ch. 53.) So held as to land taken for turnpikes. (*Dumond v. Sharts*, 2 *Paige*, 184. *Rogers v. Bradshaw*, 20 *John.* 741. *Estes v. Kelsey*, 8 *Wend.* 559.) For city streets. (2 *R. L.* 19.) Seventeenth street. (1 *Wend.* 262.) So held by the supreme court, and assumed by the court of errors, as to land taken for a railway. (*Bloodgood v. M. & H. R. R.*, 18 *id.* 26, *opinion of Edwards, senator.* (1.) The evidence on the part of the plaintiff showed the road in question in existence as a highway before 1807. The legal assumption in reference to a road shown to be open for several years is, that it was regularly opened under the laws in force at the time of and immediately prior to its first proved existence. (*Colden v. Thurbur*, 2 *John.* 424. *Ward v. Folley*, 2 *Southard*, 482. *Williams v. Herring*, 18 *Pick.* 312.) The acts under which this road would be thus presumed to have been opened, would be of July 17, 1721; November 29, 1745; February 2, 1789; April 2, 1801; and the other acts above referred to. Under either of which would the interest of the adjoining owner have been divested, and become vested in the sovereign or people, to be held and disposed of for them by the road commissioners. (*Act of 1813, April 2.*) Under those acts, the adjoining owner receives "the value of his land"—not the mere damages sustained. He receives that as well, and he parts with that, the equivalent of which he receives, *i. e.* his land. The difference of phraseology used by the legislature at the same session, in the act relating to Kings county, and the general act, proves a difference of intention. Under the general act, the right of way is taken. The only estate which will satisfy the provisions of the special acts is a fee. The language is as strong in this view as it could be made, and quite as strong as that used in acts under which



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a fee has been held to be taken. (*Estes v. Kelsey*, 8 Wend. 559. *Dumond v. Sharts*, 2 Paige, 184, and other cases above.) The motion to dismiss the complaint should have been granted. Nor has the defendants' evidence, showing the earlier existence of the road, cured this error. There is no inconsistency between the recognized use and existence as such of a strip of land for a road bed, and its being subsequently legally opened as a highway by statute. That very case is provided for by nearly, if not quite, all the acts in reference to highways. (2.) The plaintiffs' proof of the existence of the road as a turnpike, and of its being laid out as such in 1809, afforded the presumption, and the defendants' proof established the fact, that the road was regularly laid out as a turnpike under the act of 1807, and thereby the title to the road bed became absolutely vested in the turnpike company. By their charter, the company acquired the special privileges therein mentioned, and in addition, such as were granted by the general act of March 13, 1807. The fee of land taken for a turnpike road under that act is acquired by the company. (*Estes v. Kelsey*, 8 Wend. 559.) That the act intended that the soil of the road should be taken, appears conclusively from section 3, which provides that when an old highway shall be appropriated for a turnpike, a separate appraisement shall be made for the easement, to the town, and for the soil, to the owner thereof; and, by the language of the act, the company hold land taken under it, to them and their assigns forever. The language of the company's charter is broader and stronger, and has been expressly held to vest in the turnpike company a fee in the land taken under it. See *Dumond v. Sharts*, (2 Paige, 184,) in reference to the Chatham Turnpike Company, the language of the corresponding provision of the charter of which (act of April 10, 1804, 3 Kent & Rad. 579, § 1) is, that the company "shall be in law capable of purchasing, holding and conveying any estate, real and personal, for the use of the said corporation, provided that the amount of such real estate, which



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the said corporation are hereby authorized to purchase and hold, shall not exceed, at the time of purchasing the same, \$500; and provided further, that such estate, as well real as personal, so to be purchased and held shall be necessary to fulfill the end and intent of the said corporation, and to no other purpose whatever." Section 6 provides for acquiring land. "The value and damages," &c. to be appraised, and, on payment of the award, the company are "to have and to hold to them, their successors and assigns forever." See also *Rogers v. Bradshaw*, (20 John. 741,) in reference to the Waterford and Whitehall Turnpike Company, the corresponding provisions of the charter of which (*act of March 28, 1806, 4 Kent & Rad. 522*) are as follows: Section 1 provides that the company "are hereby declared capable in law \* \* \* of purchasing, holding and conveying any estate, real or personal, that they may deem necessary, to enable them to fulfill the end and intent of the corporation, provided," &c. Sections 6 and 7 provide for acquiring land against the consent of the owner, he to have "such value and damages as shall be agreed upon, or, in case of disagreement, shall be assessed," &c. (*Per Cowen, J., The Seneca Road Co. v. The Aub. and Roch. R. R. Co., 5 Hill, 172. United States v. Harris, 2 Sumn. C. C. R. 21. Harris v. Elliott, 9 Peters, 25.*) The language of section 4 of the general act of 1807 follows in detail, and almost verbatim, the provisions of these acts as to the appointment of commissioners, their proceedings, and for what they are to award. There is manifest incongruity in the company's charter permitting them to "convey" lands, if their estate in the lands died when they ceased to use them as a road. The limitation "for the use of the said corporation" is of the quantity of land, not in the character of the estate; otherwise the meaning is absurd. How can land be conveyed "for the use of the" company? The only known support for a contrary doctrine is an *obiter* remark of Judge Nelson, reversed by the above cases, (*Hooker v. Utica Turnpike Co., 12 Wend. 371,*) which would be

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correct, adding, in the language of Chancellor Kent, the qualification, "where there is no special statute provision to the contrary." (2 *Kent's Com.* 374, (307.) The Massachusetts cases are under the special act of that state providing for a reverter. (*Act of 1804, ch. 125, § 15.*) The acts provided for proper compensation to be given to all parties in interest, and the appraisers awarded \$100 for the part of the road in the city of Brooklyn to the town, to be paid to the commissioners of highways, proceeding on the idea that the fee of but little value charged with maintaining a road was in the public or in the representatives of the patentees of Brooklyn, not in the adjoining owners. Had the adjoining owner any interest in the road bed, for which no compensation is shown to have been made, it was lost by the inquisition. It was not essential to the validity of the company's title in fee, that such compensation should be made before entry and seisin in them. (*Rogers v. Bradshaw*, 20 *John.* 735. *Bloodgood v. Mohawk and Hudson R. R. Co.*, 18 *Wend.* 9.) Or even that the acts themselves should provide for compensation. (*Jerome v. Ross*, 7 *John. Ch. Rep.* 343. *Wheelock v. Young*, 4 *Wend.* 650.) After a lapse of fifty years, all proceedings to open the turnpike will be presumed to have been regularly taken, and all parties in interest to have been made parties to the proceeding. (*The Seneca Road Co. v. The Auburn and Rochester R. R. Co.*, 5 *Hill*, 181.) The entry by the turnpike company gave ample notice to the plaintiffs' grantors, and any right in them was cut off by the proceedings whether the award of damages was made to them or not, their remedy being by review of the proceedings, if the damage was erroneously awarded. (*Colden v. Thurbur*, 2 *John.* 425. *Van Steenbergh v. Bigelow*, 3 *Wend.* 42.)

IV. The title to the premises in question was therefore in the Dutch government; at the capitulation passed from them to the English sovereign; and so remained, becoming at the separation, transmitted to the people of the state; or, accord-

ing to the better view, by the charters of 1667 and 1686, was granted to the freeholders of Brooklyn. Were neither of these propositions true, it was acquired by the people under the highway acts, and whether in 1809 in the people, or in the Brooklyn freeholders, was taken by the turnpike company on compensation to the representatives equally of the people as of the Brooklyn freeholders. (*Hoff. Treat.* 292. *Act of Oct. 22, 1779, 1 Greenl.* 31.)

V. When the Dutch patent of the Powers farm was granted, and up to and after 1692, on the opposite side of the road, the land was a public common, belonging to the lord of the manor, and in this case, in 1692, by the charters of 1667 and 1686, to the freeholders of Brooklyn, whose estate in the road was acquired by the turnpike company. The presumption of title in a road bed by an adjoining owner fails where the road communicates with, is bounded by, or is contiguous to an open common. (*Woolrych on Ways*, 5. *Grose v. West*, 7 *Taunt.* 39. *Headlam v. Hedley*, *Holt*, 463.) Where farms were granted by the lord of the manor, bounded by a road in existence before the farms were laid out, on closing the road he remained owner of the soil, under the civil law. (4 *Merl. R. Jur.* 188.)

VI. The title to the premises in question being proved in the turnpike, and subsequently in the rail road company, the title in the plaintiffs and their grantors, not derived through either of those companies, fails; and it matters not where the title now is; the defendant Williams being in possession, the plaintiffs can only put him on proof of his title by proof of title or of earlier possession in them or those through whom they claim. (*Clute v. Voris*, 31 *Barb.* 511. *Smith v. Lillard*, 10 *John.* 338.) The defendant Williams did however establish his title; by deed from the turnpike company, authorized to sell and convey by their charter, and the act of April 25th, 1832, (charter of the rail road company,) through the rail road company, by their charter and the acts of 1837, page 414, 1839, page 232, and 1846, page 441, permitted to

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purchase and convey, and the subsequent *mesne* conveyances. It is to be remarked, that the acts referred to, in permitting the sale of the road, expressly enact that the estate to be taken by the purchaser shall absolutely vest in him in fee.

*Wm. Curtis Noyes*, for the plaintiffs. I. The plaintiffs made out a clear title to the premises in question by successive deeds and wills from the original proprietor, Bergen, commencing in 1787. (1.) The premises were originally "bounded easterly by the road leading from Bedford to Brooklyn ferry," which, upon well settled common law principles, carried the fee to the middle of the highway. (*Goodtitle v. Acker*, 1 Burr. 133. *Lade v. Shepherd*, 2 Strange, 1004. *Fowler v. Sanders*, Cro. Jac. 416. *Jackson v. Hathaway*, 15 John. 447. *Hammond v. McLachlan*, 1 Sandf. S. C. R. 323, 341. *Williams v. N. Y. Central R. R. Co.*, 16 N. Y. Rep. 97. 16 Barb. 160. 13 Conn. R. 23.) (2.) The same description of boundary was continued in the subsequent conveyances, with the like effect. (3.) A possession from 1786, in accordance with this boundary, was proved, and admitted of no dispute. (4.) As against the adjoining proprietor, who owned the fee to the middle of the street, the occupation of the highway as such being a mere easement, could never constitute an adverse possession. (*Smyles v. Hastings*, 22 N. Y. Rep. 217.)

II. If the Dongan grant or patent of Brooklyn is of any importance in the case, it establishes only that the lands embraced in it, including highways, were granted and held under the ordinary common law rules in regard to both species of property or interests, and not under any anomalous or other Roman or Dutch civil law rule; inasmuch as it expressly declares that they are to be "holden in free and common socage, according to the tenure of East Greenwich, in the county of Kent, in his majesty's kingdom of England," &c. So the deed introduced by the defendants, dated August 21, 1723, expressly recognizes the "king's highway" as

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bounding the lands on the east. So the record of March 28, 1709, laying out a road "from the ferry to Brookland, and so all along to Flatbush," also proves that it was a highway subject to the rule of the English common law, as to the rights of proprietors bounded by the road. So the colonial act of 27th July, 1721, proved the same thing.

III. The act of March 17, 1809, under which the Brooklyn, Flatbush and Jamaica Turnpike Company was incorporated, did not, nor did the act of March 13, 1807, (5 *Webster*, 50,) which was applied in part to that act, authorize the taking of any lands, whether a former highway or not, discharged of the claim of the adjoining proprietor to go to the middle of the road when the purposes for which the lands were appropriated, had ceased. On the contrary, the last part of section 3 of the act of 1807 expressly recognizes such right, and provides for compensation for the interest for such adjoining proprietor, as well as for that of the public, in the highway.

IV. That turnpike company never acquired any thing more than a mere easement in the premises in question; and when the user ceased as a highway, the right to the actual use and occupation reverted to the plaintiffs as owners of the soil, and they were therefore entitled to recover against the defendant who had entered upon them without title. (*Hooker v. Utica and Minden Turnpike Company*, 12 *Wend.* 371.)

V. The judge properly excluded the alleged historical evidence of grants; such facts not being capable of proof in that way. (2 *Phil. Ev. by Edwards*, 299. *Morris v. Harner*, 7 *Peters' S. C. R.* 554. *McKinnon v. Bliss*, 21 *N. Y. Rep.* 206, 214, 215.)

*By the Court*, BROWN, J. When the plaintiffs closed their testimony and rested, upon the trial of this action, they had established, *prima facie*, a title to the premises in question. These consisted of the western half of the road bed of the Brooklyn, Jamaica and Flatbush turnpike road, near

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Hanson place, in the city of Brooklyn. The route of the turnpike is at this point identical with an old road mentioned in the deeds of conveyance as the road leading from Bedford to Brooklyn ferry. The plaintiffs claimed title under one Michael Bergen, and read in evidence two deeds of conveyance for a farm of land containing 90 acres, more or less, dated May 11th, 1787. One from Michael B. Grant and Catherine Bergen, relict of Michael Bergen, to George Powers, butcher; and the other from John Grant and Sarah his wife, one of the daughters of Michael Bergen, and Michael B. Grant, eldest son of John Grant, to the same grantee. Jeremiah Lott, who was examined as a witness for the plaintiffs, said he resided in Flatbush since 1779, and knew George Powers the elder. First knew him when he was a butcher; he lived on this farm and died in possession of it. He was succeeded in possession of the farm by his son George Powers, who also died in possession some 15 or 20 years before the trial. His wife succeeded him in the possession. Thought Michael B. Grant was Michael Bergen's daughter's son, and that Powers had the farm from Michael B. Grant. The Powers dwelling house was on the premises, near to and on the westerly side of the road. He surveyed the road for the turnpike company when it was laid out as a turnpike, to which time it had been used as a public highway. It was also proved by the testimony of Silas Ludlam, that he surveyed the premises for Mary Powers; that herself and son occupied the farm and premises until about ten years before the trial, when the dwelling house was removed by direction of the authorities of the city, on the opening of Flushing avenue. The turnpike road was discontinued as such, and no longer used, about six or eight years before the trial. After Flatbush avenue was graded and paved, the old road became impassable and was discontinued. About five years before the trial, the owners of the land on the side of the road opposite the Powers farm fenced in one half of the road in front of them, and the fence inclosing the half of the road in front of

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the Powers property—the *locus in quo*—was built about two years before the trial, by the purchasers from the turnpike company. The plaintiffs produced and proved, upon the trial, a regular chain of title for the Powers farm, by devise from George Powers the elder to George Powers the younger, and by devise from the latter to Mary Powers. They also produced and read in evidence several mesne conveyances, which vested in themselves whatever title Mary Powers had to the premises in controversy, under the two devises before referred to.

By a reference to the two deeds of the 11th of May, 1787, which are the foundation of the plaintiffs' title, it will be seen that the premises conveyed are bounded easterly by the road leading from Bedford to Brooklyn ferry. Upon this description the plaintiffs do not, as the defendants' counsel supposes, claim title to the westerly half of the road bed as an incident to the grant of the adjoining land. They claim it as a part of the premises conveyed, and within the terms of the grant. The description is not such as necessarily to exclude the road or highway from the effect of the grant. No words are used indicating an intention to limit the eastern boundary to the westerly line of the road. On the contrary, the words of the grant include, by fair interpretation, the one half of the road bed which are the premises in dispute. In *Jackson v. Hathaway*, (15 John. 447,) which was an action of ejectment brought to recover certain premises in the city of Hudson, which were formerly a public highway, but had been discontinued by an order of the common council, the heir at law of the patentee was the lessor of the plaintiff. The lands upon both sides of the highway had been conveyed to those under whom the defendants claimed, and the question was whether the bed of the road passed to the grantees under the deeds, or remained in the original patentee or his heirs. Upon the production of the deeds, it appeared the premises in both conveyances were bounded on the north side and on the south side of the road. The descriptions mani-



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testified a plain intention to exclude the land covered by the road from the effect of the grants. The court say, "the boundaries in these deeds do not include the space of the road, and of course the plaintiffs' title to the intervening ground remains as perfect as if no road had ever been there. The purchasers under those deeds have lost an easement which was public, not private, but they have, exclusive of the old road, all the land they bargained for." Again, it is said to be "impossible to protect the defendant on the ground that the adjoining road passed by the deeds as an incident to the lands professedly granted. A mere easement may, without express words, pass as an incident to the principal object of the grant, but it would be absurd to allow the fee of one piece of land, not mentioned in a deed, to pass as appurtenant to another distinct parcel which is expressly granted by precise and definite boundaries. The plaintiff recovered because the land claimed was not mentioned in the deed of his ancestor, and could not pass as incident to another parcel. The justice who delivered the opinion, however, declares what is regarded as the settled rule, that where lands are bounded by a public highway, or the courses in the deeds of conveyance run to a public highway, or any similar object, the premises conveyed extend, by fair construction, to the middle of the highway or object named;" for, he says, that "where a farm is bounded along a highway, or upon a highway, or running to a highway, there is reason to intend the parties meant the middle of the highway." (*See 3 Kent's Com.* 433, 434. *Starr v. Child*, 20 *Wend.* 149. *Sizer v. Devereux*, 16 *Barb.* 160.) It appears to me, therefore, that at the close of the plaintiffs' evidence the proof was sufficient to entitle them to recover, and to cast upon the defendants the burthen of showing title out of the plaintiffs.

There were two principal grounds taken to show that the plaintiffs were without title to the premises in dispute. 1st. That the common source of title to the premises claimed, and also to the adjoining premises, was the Dutch gov-



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ernment, which granted a patent for the Powers farm in 1846, at which time the premises claimed were in use as a public highway. The civil law prevailed in the Netherlands and their colonies at that time, and by the rule of the civil law, the sovereign or government was the absolute owner of the soil of the public highways, and the title of the adjoining owner was absolutely divested. The defendants produced evidence tending to show that the road from Bedford to Brooklyn ferry, originally an Indian path, was in use as a highway or road for transit while the Dutch held dominion over the country. They also proved that the Powers farm was held by the ancestor of Michael Bergen, who died during the revolution, under a patent granted by William Kieft, on behalf of the Dutch government, of the date of February 22, 1646, and by a confirmatory patent from Richard Nicholls, governor general &c. under the Duke of York, of the date of June 21st, 1667. There was no proof, however, to show how, when or by whom the old road was laid out or dedicated; whether by the government over lands of private persons taken for that purpose, or by reservations by the government from the lands patented to the original proprietors; or by dedication of the proprietors themselves. Upon all these questions, so material to maintain the defendant's theory and first ground of defense, we are left entirely to presumption and conjecture. It is more than two hundred years since the Dutch government have ceased to exercise any power or dominion over the land, and it may be worth while to examine for a moment the effect of these various deeds and grants, and the possession of the Bergen and the Powers family under them, for so great a length of time. To go no farther back than the 11th May, 1787, the date of the two deeds to George Powers, we find that from that time, a period of more than seventy years, the Powers family and their grantees have been in the actual possession of the lands adjoining the road, under a deed of conveyance which I have shown embraced the lands to the center of the road, to which

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they claimed title, subject to the public easement. They were therefore in the constructive, if not the actual, possession of the *locus in quo*. They could have maintained an action of ejectment for an exclusive appropriation of any part of the roadway, and the sheriff would have delivered them the possession, subject to the public easement. They could have maintained an action of trespass against a person removing trees, gravel or soil, or doing any tortious act other than exercising the mere right of passage. (*Goodtitle v. Acker*, 1 Burr. 133. *Etz v. Daily*, 20 Barb. 32. 3 Kent's Com. 432. *Gidney v. Earl*, 12 Wend. 98.) The mere ability to maintain the action of trespass for an injury to lands, subject to the easement of a public highway, shows that the law regards the owner of the fee as in the actual possession. For it is an elementary principle familiar to us all, that as the gist of the action is the injury to the possession, unless at the time the injury was committed the plaintiff was in the actual possession, trespass cannot be supported. (See the cases referred to in the notes to 1 Chitty's Pl. 175.) In *Gedney v. Earl*, Mr. Justice Nelson says: "The right of way, public or private, is but an incorporeal hereditament, an easement which *per se* does not divest the owner of the fee of the land; and for any other purpose, except the use or servitude as a public highway, the soil belongs to him, and he is entitled to the same remedies, for an injury to his residuary interest, that he would be entitled to if it was entire and absolute. The law will not presume a grant of a greater interest or estate than is essential to the enjoyment of the public easement: the rest is parcel of the close. The fact that the highway is fenced on each side is for the convenience of the owner, and has no necessary connection with the road. It follows from the above view that the person in possession of the farm or lot through which the highway passes, is in contemplation of law in possession of the highway, subject to the public easement; for being in possession of the lot, he is *prima facie* in possession of every parcel of

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it." It would be an unreasonable and an unwise conclusion to hold that these legal results from undisputed facts should be disregarded and set aside, upon the mere presumption that the Dutch government may have reserved to itself in the original patents, or obtained in some other unknown way, the title to the land embraced within the lines of the old road.

The second ground of defense consisted in showing title out of the plaintiffs and their grantors, acquired by the Brooklyn, Jamaica and Flatbush Turnpike Company, under two several acts of the legislature, which were read in evidence and referred to upon the trial. The defendants also produced and proved a deed of conveyance from the turnpike company to the Brooklyn and Jamaica Rail Road Company, bearing date August 2d, 1832, for the turnpike road, including the premises claimed by the plaintiffs, together with divers other mesne conveyances, which finally vest whatever right and title the rail road company acquired under the deed from the Brooklyn, Jamaica and Flatbush Turnpike Company in the defendants in this action. The existence of these various deeds of conveyance was not controverted upon the trial, and as the right of the defendants depends exclusively upon the question whether the turnpike company acquired the fee of the lands taken for the use of the road, or an easement and right of passage only, it will not be necessary or useful to notice them, farther.

The Brooklyn, Jamaica and Flatbush Turnpike Company was incorporated by the act of the 17th March, 1809. And by the 1st section it was declared to "be in law capable of purchasing, holding and conveying any estate, real or personal, for the use of the corporation," with the proviso that such estate "shall be necessary to fulfill the objects of the corporation, and to no other purpose whatever." The 5th section named the commissioners to lay out the road directed by the act, "subject to the directions, regulations and restrictions in all respects as are prescribed and contained in the act relative to turnpike companies, passed March 13th,

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1807. The 3d section of this latter act provides that commissioners, appointed by the governor, shall lay out the road in such manner that the object of the corporation and the general interest of the public shall in the best manner be effected. It also provides for an agreement with the owners of the land for the purchase of so much thereof as shall be necessary for making the road, and for gates, toll-houses and other works. And in case of disagreement, it provides for the making of an estimate and assessment of the damages which the owners of the land used or to be used for the road may sustain, or will sustain, with a provision that the corporation shall not enter upon the lands for the purpose of making the road thereon until the damages are paid. The section also prohibited the corporation from appropriating any highways to the uses of the turnpike road, until such highway should have been appraised and paid for to the commissioners of highways of the town in the manner directed for the taking of private property. The appraisers appointed to make this appraisal filed their inquisition, dated August 1st, 1809, and thereby found the road upon which the turnpike was laid out to be a public highway, and they awarded \$100 for damages to the town of Brooklyn, and \$50 to the town of Flatbush, to be paid to the commissioners of highways of such towns. I see nothing in the two acts of the legislature to which I have referred, to justify or authorize the opinion that the legislature intended the turnpike corporation should acquire the title in fee to the lands needed for the construction of their road. Such a legislative intent will certainly not be implied, or inferred, from any loose or careless expressions to be found in the acts themselves. Those who seek to establish such consequences as the foundation of a title to lands, must find authority for it in the language which the legislature have used, considered in reference to the objects and purposes which the laws were designed to accomplish. This is just what the act of incorporation itself declares; for it limits the power of the corporation to the acquisition

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of such real and personal estate as shall be necessary to fulfill the objects of the corporation, and declares it shall hold real property for no other purpose whatever. The objects which were to be accomplished by the corporation was the construction of a public highway or road for public travel, to be maintained and kept in order at its own cost, and upon which it had the right to erect gates and take tolls from travelers. All the estate it needed in the lands taken for the road was the easement or right of way known to the law in the classification of property as an incorporeal hereditament. The use to which the road was to be devoted was not to be confined to the corporation and its employees, like that of a railway operated by steam. But the use was a public use, open to all who chose to enter upon it, and was in no way distinguishable from a common highway, except that it was to be constructed and maintained by the corporation, with the right to take tolls thereon. We see the same proceedings, substantially, for the opening and laying out the turnpike as are followed in laying out and opening a public highway, so far as relates to the acquiring the right of passage, and the land owners are to be compensated for the damages sustained by them for the lands used or to be used for the road. The compensation is not measured by the value of the lands, as it certainly would have been if it was intended to take the property in fee, but it is the damages which the owners sustain by the use of the lands required for the road. This shows that the framers of these statutes had in mind the easement, and not the fee of the land. And so we find that the damages awarded by the appraisers for the old road taken for the use of the turnpike, were given to the highway commissioners of the towns of Flatbush and Brooklyn, who certainly had nothing but the right of way, and not to the owners of the fee, because the fee was not taken. I am therefore of opinion that the turnpike company did not acquire, and had no authority to acquire, under their act of incorporation, any other estate in the lands taken for the road than

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an incorporeal hereditament or right of passage. The rights of a turnpike corporation to lands thus acquired, were considered and passed upon by this court in the case of *Hooker v. Utica and Minden Turnpike Co.* (12 *Wend.* 371.) The corporation was created by an act passed March 24th, 1809, the same session at which the Brooklyn, Jamaica and Flatbush turnpike act was passed, and the provisions of the two acts are in many respects identical. The corporation was authorized, upon paying to the land owners the sums assessed and awarded to them by the appraisers, to have and hold, "to them and their successors and assigns, the lands and tenements in the inquisition described, and the company was not to enter upon the lands until the damages were paid." This language, it is to be observed, is much stronger, and would be regarded as much more effectual to vest the company with the estate in fee, than the language used in the Brooklyn, Jamaica and Flatbush act. The action was brought against the defendant for digging and tearing up a sluiceway in the road. It appeared on the part of the defense, or what was equivalent, there was an offer to prove, that the part of the road where the sluiceway was, had been abandoned by the company since 1826, (the alleged trespass having been done in 1829,) and had been fenced by the owners of the land. The evidence was rejected, and the turnpike company had a verdict, the judgment upon which was reversed upon a writ of error. Mr. Justice Nelson, who delivered the opinion of the court, saying, "The owners of the lands through which the road ran, had good cause for believing that the corporate rights of the company had been voluntarily abandoned, and the lands had reverted to the original owners. Although the act of incorporation vests in the company the title to the lands over which the road passes, on compliance by them with the provisions of the act, such title must nevertheless be considered as vested only for the purposes of a road, and when the road is abandoned, the land reverts to the original owners." This decision is in harmony with the constitutional rule as

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now understood, that the power to take private property for public use, under the law of eminent domain, excludes the idea that it may be taken for private use, or taken under the semblance of public use, and immediately or ultimately conveyed and appropriated to private uses. Very many of the numerous turnpike roads which extend over the country in all directions are gradually being abandoned, under the influence of modes of travel and transit unknown and unthought of by the framers of these statutes. And it would be an intolerable burden upon the property through which they were made, if upon their disuse and discontinuance the corporations were entitled to the rights of owners in fee, with the incidental power to sell and convey to private uses, and to exclude the owners of the adjoining lands from all rights of entry and passage over these narrow strips of territory, worthless for cultivation or agricultural purposes, and available only in connection with the adjoining lands, and which but for the road would have remained part and parcel of their own property. The only sensible rule is that asserted in the case last quoted—that where the language of the act of incorporation is such as to vest the title in the company, it must nevertheless be considered as vested only for the purposes of the road; and when the road is abandoned, the land reverts to the original owner.

Several questions were raised during the trial upon the admissibility of testimony, which, upon the view I have taken of the case, it is not material to consider.

Judgment should be entered, upon the verdict, for the plaintiffs.

[KINGS GENERAL TERM, February 10, 1862. *Emott, Brown and Scrugham, Justices.*]

**THE PEOPLE, *ex rel.* Ridgeway, vs. CORTELYOU and others.**

From an order made by commissioners of highways, laying out a public highway, an appeal lies to the county judge by every person who shall conceive himself aggrieved by such determination, provided he be a resident taxpayer of the town, and as such, liable to assessment therein for highway labor.

It was not the intention of the legislature to restrict the right of appeal to the applicants for the road, and those persons over whose lands it is proposed to lay it out.

It is the duty of referees appointed by a county judge, to hear and determine an appeal from an order of commissioners of highways, laying out a highway, to proceed to hear the proofs and allegations of the parties, and to make and file their decision in writing, affirming, reversing or modifying the order appealed from. They have no power to dismiss the appeal and refuse to proceed further, upon the ground that the order of the county judge was improvidently or irregularly granted, or that the appellant had no right to bring an appeal.

But if the referees, instead of hearing and determining the appeal, dismiss the same, upon a preliminary objection, and thus in effect refuse to execute the trust committed to them, the remedy of the party is not by a common law *certiorari* to review the proceedings, but by a *mandamus*, it seems, to compel the referees to proceed.

**C**ERTIORARI to review the proceedings and decision of the defendants, as referees appointed by the county judge of Richmond county, to hear and determine an appeal brought by James Ridgeway, the relator, from an order and decision of the commissioners of highways of the town of Northfield in said county, laying out a certain road therein.

*L. Brownell*, for the relator.

*Lot C. Clark*, for the defendants.

BROWN, J. The commissioners of highways of the town of Northfield, in the county of Richmond, made an order in the usual form, laying out a public highway therein, upon the application of one Daniel Willis. From this order James Ridgeway, the relator, appealed to the county judge, who thereupon duly appointed Lawrence H. Cortelyou, John H.



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Healey and Webley I. Edwards, three of the defendants, referees to hear and determine the appeals which might be brought from the order of the commissioners within the time allotted for that purpose. Notice was given to the referees of their appointment, who took the oath required by the statute, and became qualified in all respects to execute the trust confided to them. At the hearing before the referees, witnesses were examined on both sides, mainly upon the regularity of the proceedings before the commissioners for laying out the road, and their authority and jurisdiction in regard thereto. It appeared in the course of the examination that the appellant, James Ridgeway, was not an applicant for laying out the road, and that it was not laid out through any lands of which he was the owner or in which he had any interest, but that he was a resident freeholder and tax-payer, in the town of Northfield. Upon these facts a motion was made by the counsel for the respondents to dismiss the appeal, which was entertained and granted by the referees, upon the ground that James Ridgeway owning no land through which it was proposed to lay out and open the road, and not being a person upon whose application the commissioners had proceeded, was not entitled to the benefit of an appeal from the commissioners' order. It is to review and reverse this decision of the referees that this writ of certiorari is brought.

The case of *The People v. Goodwin* (1 Seld. 568) is authority for the rule that, when "inferior magistrates are required by writ of certiorari to return their proceedings, it must appear, affirmatively, that they had authority to act. And when their authority and jurisdiction depends upon a fact to be proved before themselves, and such fact be disputed, the magistrate must certify the proofs given in relation to it, for the purpose of enabling the higher court to determine whether the fact be established." In proceedings to lay out and open public highways, the existence of certain facts is necessary to give the commissioners jurisdiction; such

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as the consent of the owners, or the certificate in writing of twelve freeholders having the requisite qualifications, where the proposed route is through improved or cultivated land, the posting up and service of the necessary notices as prescribed by the highway act, &c. Upon the authority of the case to which I have referred, three facts are open to be controverted before the commissioners or referees, and their existence must be affirmed by the proof, in order to confer jurisdiction. Upon an appeal and hearing before the referees, the evidence to prove or disprove any of these jurisdictional facts goes to the foundation of the whole proceeding, and leads directly and inevitably to a reversal or affirmance of the order of the commissioners appealed from. (*The People v. Cline*, 23 Barb. 197.) In the present case, the referees have done nothing of the kind. They neither reverse nor affirm the order of the commissioners laying out the road; but upon a preliminary objection that the relator had no right to bring an appeal, they have dismissed his appeal, and declined to proceed further in the examination and determination of the question of the propriety and expediency of laying out the road. In this I think they erred. The right of appeal is given to every person who shall conceive himself aggrieved by any determination of the commissioners. Whether the person bringing the appeal really conceives himself aggrieved, or whether he maintains that relation to the proposed improvement which entitles him to conceive himself aggrieved by what the commissioners may do or omit to do, is a collateral issue, and one with which the referees have nothing whatever to do. Upon receiving notice of their appointment, together with the papers appertaining to the matters referred to them, it was their duty to proceed, upon the requisite notice, hear the proofs and allegations of the parties upon this appeal, and also upon all others made from the same order within the time limited by the statute, and to make and file their decision in writing, affirming, reversing or modifying the determination of the commissioners of high-

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ways as expressed in the order appealed from. They had no power to dismiss the appeal and refuse to proceed further, upon the ground that the order of the county judge was improvidently or irregularly granted.

This view, if it be correct, would dispose of the decision made by the referees in dismissing the relator's appeal, and entitle him to the relief sought for by this writ or by some other more appropriate to effect that object. I will, however, consider briefly, whether the relator was really without any right to appeal from the order of the commissioners laying out the highway. He was not an owner of the land through which the road was proposed to be laid, nor was he the person, or one of the persons, upon whose application the proceedings were instituted. To entitle a person to appeal from such an order, it is said he must stand in the relation of an owner whose land is to be taken for the improvement, or of an applicant who has set the proceedings in motion. One of these relations can alone make him a party to the proceeding. And no other than such a party can maintain the right to appeal, because, in respect to all other persons, the injury resulting from the proposed highway would be general and not special. We are referred to the case of *Davis v. Mayor &c. of New York*, (4 Kern. 506,) where the court of appeals held that an action does not lie at the suit of a resident and tax-payer of the city who does not own real estate on a street where a railway is proposed to be laid, and to whom it will not be specially injurious, to prevent its construction. But the court also held that the railway proposed to be laid down in Broadway would have been a public nuisance, in respect to which no private individual could maintain an action without showing some special injury resulting therefrom to himself. Nor would equity entertain jurisdiction, unless the public nuisance occasions, or is likely to occasion, a special injury to an individual which could not well be compensated in damages. This is the rule of the common law

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applicable to public nuisances and actions by private persons therefor.

It is to be observed that the right of appeal from the order of highway commissioners does not depend upon any general rule of law, such as obtained in the case referred to. It exists by statute, in regard to a special class of public improvements affecting a particular locality. The highway act gives the right of appeal to "every person who shall conceive himself aggrieved by any determination of the commissioners of highways, either in laying out, altering or discontinuing, or in refusing to lay out, alter or discontinue any road. (§ 8 of the act of the 14th Dec. 1847.) This is sufficiently comprehensive to include the resident freeholders and taxpayers of the town where the road is located. And its general terms show that the legislature had no intention to restrict the right to the applicants for the road and those persons over whose lands it was proposed to lay it out. The burden of paying the damages for the lands taken for the road is cast upon the tax-payers of the town and their property therein, as are also the expenses of making and maintaining the bridges thereon. The burden of performing the labor and keeping the road in repair, is imposed not upon the people of the town generally, but upon the people of the particular road district where the road is located. It may be that burdens of this character may become oppressive and grievous, and it is certainly wise and just that the persons charged with their payment should have an opportunity to be heard upon the legality and necessity of the improvement. These considerations refer exclusively to the creation of new roads and highways. But what shall be said of the right of appeal from orders of the commissioners altering or discontinuing roads already in existence, and, it may be, of immemorial use. The same sentence confers the right of appeal in both cases. To entitle a resident freeholder and tax-payer to be heard upon appeal from an order discontinuing a public road which he, and those under whom he claims, have used time

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out of mind, and which contributes to his convenience and enhances the value of his property, must it appear that the road runs through his lands, or that he is an applicant for its discontinuance? This is the construction asserted by the decision of the referees, and claimed to be the true one by the counsel for the defendants, upon the argument. I dissent from it. I regard it as at variance with the letter, as it also is with the spirit and intention, of the statute. But again; it is conceded that the applicant for laying out, altering or discontinuing a road may appeal from the order or determination of the commissioners. The party who initiates such a proceeding, and fails before the commissioners, should certainly be allowed to prosecute his appeal from the adverse determination. This seems too plain for argument. The applicant, however, need not be an owner of lands through which the road is proposed to be laid. He need have no special interest in the proposition to lay out, alter or discontinue the highway in question. By the 58th section of the act in regard to laying out, altering and discontinuing public and private roads, it is provided that "every person liable to be assessed for highway labor, may apply to the commissioners of highways of the town in which he shall reside to alter or discontinue any road, or to lay out any new road." To entitle a person to become an applicant and an actor in such a proceeding, his only qualification is that of liability to assessment for highway labor in the town. To entitle a person to prosecute an appeal from an order or determination in such a proceeding, it is enough if he be a resident tax-payer of the town, and as such liable to assessment therein for highway labor. The provisions of the two sections, taken together, leave no doubt as to the construction to be put upon that in regard to the right of appeal.

Nevertheless, I think the relator has mistaken his remedy. It was the duty of the referees to hear the proofs and allegations of the parties, and make a determination which should reverse or affirm the order of the commissioners. This they

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have not done. They have taken some proof and then dismissed the appeal. In effect, they have refused to execute the trust committed to them. There is nothing in their proceedings which it is the office of a common law certiorari to review and correct. It brings up the record and examines the action and proceedings of the inferior magistrate, so far as his authority and jurisdiction is concerned, but no further. His decision upon all other facts is final, and will not be reviewed. In respect to the remedy, the case of *The People ex rel. Rogers v. The County Judge of Clinton*, (13 How. P. R. 277,) is similar to the present. The county judge had erroneously dismissed an appeal from the justice's court while an order for an amended return was pending, unexecuted. It was held that if he acted ministerially, or if he had no power under section 364 of the code to dismiss the appeal, the matter was not within his judicial cognizance, and therefore the order to dismiss was a nullity, and a mandamus to hear and decide the appeal should issue. In *The People ex rel. Bendon v. The County Judge of Rensselaer*, (*Id.* 398,) appeals had been taken from two judgments rendered under the provisions of the mechanics' lien law. The county court, upon motion, dismissed the appeals upon the ground that it had no jurisdiction. The court at special term was of opinion that the county court erred, and awarded a writ of mandamus requiring the county judge to reinstate the appeals and to hear and decide them. These authorities indicate the true remedy of the relator. Indeed, I do not see what judgment could be rendered upon this proceeding. The referees have not, in effect, done any judicial act within their cognizance which we can either affirm or reverse.

An order should be entered quashing the writ of certiorari and all the subsequent proceedings, without costs to either party, and without prejudice to any other remedy which the relator may be advised to pursue.

SCRUGHAM, J. concurred.

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EMOTT, J. Without expressing any opinion whether Ridgeway could appeal, I think the proceeding by certiorari was not the proper remedy.

Proceedings quashed.

[KINGS GENERAL TERM, February 10, 1862. *Emott, Brown and Scrugham, Justices.*]

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THE NORTH BAPTIST CHURCH ON STATEN ISLAND vs. PARKER and others.

Where the right of persons claiming to be trustees of a religious society, to the office of trustee, is disputed and denied, and they have not yet been admitted to the exercise of any of its rights or duties, and they are not and have not been in possession of the church edifice, nor of any of the temporalities of the church, they cannot maintain an action in the name of the religious society, to restrain individuals in possession and claiming to be the trustees of the society, duly elected, from closing the church edifice and from preventing the pastor from holding religious meetings therein, &c. Before they can institute or maintain such an action, the plaintiffs must have been peaceably admitted to the office of trustees of the society, or have established their title thereto by a direct proceeding or action brought for that purpose, by the attorney general.

The court will not, upon motion, decide who are the rightful trustees of the society, or determine the question of right to the office.

**A**PPEAL from an order made at a special term, dissolving an injunction, and dismissing the complaint.

*E. D. Culver*, for the plaintiff.

*M. Hale*, for the defendants.

*By the Court*, BROWN, J. The plaintiff is a religious corporation, duly organized under the statute, and has been in existence since the 9th day of March, 1841. The certificate of incorporation provides for six trustees, and the temporali-

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ties of the church consist of a house of worship, at Port Richmond in the county of Richmond, of the value of \$4000 or thereabouts, and the book containing the records and proceedings of the board of trustees. The complaint alleges that the congregation worshipping in the church edifice is connected with the Baptist denomination of christians, having a pastor, the Rev. William A. Barnes, settled therein according to the custom and practice of that church. It also alleges that on the 11th of February, 1861, the defendants excluded the plaintiff and the said William A. Barnes from the said church edifice, and refused to allow the plaintiff and the said Barnes to enter or use the same for the purposes of worship, and afterwards forcibly expelled from the said edifice one William Strothers and Thomas Coffey, who were there by the order and direction of the plaintiff, who was lawfully and peaceably in possession thereof, and have from that time hitherto prevented the said plaintiff, its minister, agents and officers from entering therein, and threaten to prevent them from entering and using the church edifice for church purposes thereafter. It prays for an injunction restraining the defendants from closing up the church edifice, and from preventing and interrupting the minister or pastor from preaching and holding religious meetings therein, &c., and for the recovery of \$500 damages. Upon this complaint, verified by affidavit, the plaintiff obtained an injunction from the city judge of Brooklyn. The defendants applied, upon due notice, to the special term held before Mr. Justice SCRUGHAM, at Brooklyn, on the 6th of August, 1861, for an order dissolving the injunction and dismissing the complaint, upon the ground that the action had been instituted by Milton W. Gray, William Strothers, Thomas Coffey and David Strothers, claiming to be the trustees of such corporation, but who in fact were not the trustees thereof, and had no authority whatever to institute such action. The defendants also read affidavits and papers to show that they, together with one David Muddle, were five of the trustees; and so on



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the other side, affidavits were read to show that Gray, Coffey and the two Strothers were in fact the trustees of the corporation. The judge at the special term granted the defendants' motion, dissolved the injunction and dismissed the complaint; from which order and decision the plaintiff, or those claiming to act in its behalf, appealed to the general term.

The 6th section of the act to provide for the incorporation of religious societies directs the manner in which the election of trustees shall be conducted, and it declares that the persons elected shall receive a certificate of their election from the officers conducting the same, which shall entitle them to act as trustees. Such a certificate is not conclusive, but it is *prima facie* evidence that the person to whom it is given is a trustee. It constitutes the holder a trustee *de facto*, and upon all questions and controversies, except a direct proceeding to try the title in the nature of a *quo warranto*, would be held to clothe the holder with the attributes of the office. The omission to furnish the certificate does not, however, disqualify the person who is duly elected. It is evidence of his title. But his right may be shown *aliunde*. It is characteristic of this motion, that no proceedings of any meeting of the congregation for the election of trustees are furnished in the motion papers; nor are there any certificates of election produced or referred to, so that we could form some idea who really were entitled to hold that office. The proof of the right to the office rests mainly upon the assertions of the claimants themselves, coupled with the corroborative evidence in favor of the defendants, to which I will presently refer. Gray, Coffey and the two Strothers swear that they are severally trustees duly elected, and so does William A. Barnes, the minister. The latter states a fact of some significance, and which throws some light upon the nature of the controversy, and that is, that on the 21st of February, 1861, the defendants Pero, Wenside, Parker and Hooker were expelled and excluded from the church, and one Gridham was chosen clerk in the place of Pero, whose exclusion from the church

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disqualified him from being an office bearer. These witnesses concur, however, in some things which are quite important in determining their right to institute this action and carry on this litigation in the name of the corporation; and these are: That the right of Gray, Coffey and the two Strothers to the office of trustees is disputed and denied, and that they have not yet been admitted to the exercise of any of its rights or duties. That they are not, and have not been, in possession of the church edifice, nor of any of the temporalities of the church, not even the book containing the records and proceedings of the congregation. These facts alone should exclude them from the use of the corporate name, and from instituting or maintaining this action, until they shall have been peaceably admitted to the office of trustees of the church, or shall have established their title thereto by a direct proceeding or action brought for that purpose. On the other side, the defendants claim that they have been duly elected the trustees of the church, and have for some time past performed the duties and exercised the rights appertaining to the office. That they have possession of the church books containing the records of the meetings of the congregation, and have actual possession of the church edifice, which edifice and books constitute all its property and temporalities. It is to dispossess them of this property that the action is brought. We cannot, upon a motion of this kind, determine who the rightful trustees of the church really are. We cannot determine the question of right to the office. The result of the present motion depends upon ascertaining which of the two classes of persons are in possession of the office, performing its duties and exercising its rights under color of title. If Gray, Coffey and the two Strothers have failed to show themselves to be in this condition—that they are the trustees *de facto*—they had no right to institute this action, and the order of the special term should be affirmed, unless it shall appear, as was insisted by the counsel for the plaintiff, upon the argument, that the right to the office can be tried and de-

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terminated in this action. The four persons last named are not using their position and claim as a means of defense and shelter. They employ it as a weapon of offense—as an instrument of aggression—and unless the title can be put in issue in this action, they are not in a condition to use the corporate name for the purpose of furthering their personal interests and objects.

The action is in the name of the corporation, and its professed object is to recover the possession and control of the church edifice or place of worship for the use of the corporation, upon the ground that the corporation has been excluded and dispossessed by the wrongful act and entry of the defendants. In any action brought to enforce a right or redress a wrong, it must be assumed that the plaintiff is present in court, and has a standing therein by his own voluntary act. It can proceed upon no other hypothesis. The complaint speaks in the name of the plaintiff. It is the plaintiff himself that complains of the acts or omissions of the defendant. The answer must contain matter which is a defense to the allegations of the complaint. It may allege the want of capacity in the plaintiff to sue, or facts in bar or avoidance of the allegations of the complaint, so as to justify or excuse whatever is alleged. But it cannot set up that the plaintiff is not present in court; that some one else is using his name to institute and prosecute the action without his authority or sanction. Such an answer would not meet a single allegation of the complaint, and would form no issue for trial upon the pleadings. An answer which should allege as a defense, that the attorney was not authorized to bring the action; or, in an action in the name of a corporation, which should set up that it was brought without the authority or knowledge of its managers or directors, would be treated and struck out as sham, simply because such an answer would not meet the allegations of the complaint, or lead to an issue which could be tried. *Nul tiel* corporation is a plea which involves the corporate existence of the plaintiff, and as a consequence

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its capacity to sue; but the defense to which I before referred admits the existence of the corporate body and its capacity to bring an action, but denies that the action brought is its action. Were the defendants in this action to set up in their answer their own title to the office of trustee and deny the title of Gray, Coffey and the two Strothers who have instituted this action, a more serious consequence than that already mentioned would ensue, were the latter to accept the issue and go to trial. The verdict or the decision, whatever it might be, would determine nothing. It would conclude neither party, and leave the title to the office still in doubt. For there is no proceeding known to our practice by which the title to an office may be determined but that provided in chapter 2, title 13 of the code, which is the substitute for the old proceeding by information in the nature of *quo warranto*. In this the attorney general is the actor, and not a private person. Its sole office is to try the title of the person alleged to have intruded and that of the relator or person claiming the office. In the case of *Mickles v. The Rochester City Bank*, (11 *Paige*, 118,) it was adjudged that a court of equity cannot interfere to restrain persons claiming to be the rightful trustees of a corporation from acting as such, on the ground that they have not been duly elected. The preliminary question of the right to the office must first be determined, before the court can make any decree. So in this case, Milton W. Gray, William Strothers, Thomas Coffey and David Strothers must first establish their title to be trustees of the North Baptist Church on Staten Island, by an action brought by the attorney general for that purpose, before they can bring an action and carry on a litigation in its name.

The order made at the special term should be affirmed, with costs to be paid by Milton W. Gray, William Strothers, Thomas Coffey and David Strothers.

[KINGS GENERAL TERM, February 10, 1862. *Emott, Brown and Serugham*, Justices.]

**THE PEOPLE, *ex rel.* Stephen Crowell and others, *vs.* JOHN D. LAWRENCE and others, Commissioners, and THE BROOKLYN CENTRAL AND JAMAICA RAIL ROAD COMPANY.**

If the state has the power to levy and collect a tax or assessment, to be paid to a rail road company as a compensation for the relinquishment of certain rights, it has the power to direct the transfer of the assessment, collectively, to the same company, for the same purpose, before its payment.

The imposition and confirmation of an assessment by the city of Brooklyn, in pursuance of the act of April 19, 1859, for the purpose of compensating the Long Island Rail Road Company for the relinquishment of its right to use steam power within said city, are not forbidden by the act relative to local improvements in the city of Brooklyn, passed April 11, 1861. (*Laws of 1861, p. 462.*)

Where commissioners of assessment, appointed under the act of April 19, 1859, upon certiorari directed to them, return the proceedings which resulted in their appointment, by which it appears that both the common council of Brooklyn and the supreme court, at special term, determined that a petition by a majority of the persons to be assessed, sufficient in form and character, had been presented to the common council, such determinations will be held conclusive, upon that question.

The acts of April 19, 1859, (*Laws of 1859, p. 1109,*) and March 23, 1860, (*Laws of 1860, p. 173,*) are not in conflict with the 16th section of the third article of the constitution, which declares that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in its title."

Neither are those acts unconstitutional, on the ground that they authorize the taking of private property for a purpose not sanctioned by the constitution, and in a manner which that instrument forbids.

When the legislature determines that a public improvement will be a benefit to the adjacent property, and that the expenses of making the same shall be paid by the owners of such adjacent property, the courts have nothing to do with the correctness or incorrectness of the determination, but must assume the fact to be as the legislature assumes or declares it.

The wisdom or justice of the taxation is not a subject of judicial inquiry; nor is the purpose for which the tax is to be imposed.

The legislature is not confined, in such taxation, to existing political or civil districts; but may create a district for the purpose of taxation or assessment; and may impose the tax equally or *pro rata* upon all the property in the district thus formed *pro re nata*, or upon a rule of estimated benefit to different owners or individuals; and the proceeds of the assessment may be applied to some public or quasi public purpose, or to compensation to, or the redress of, individuals.

The constitution demands that the title of an act shall express the *subject*, not

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the *object*, of the act. It is the matter to which the statute relates, and with which it deals, and not what it professes to do, which is to be found in the title.

It is no constitutional objection to a statute that its title is vague or unmeaning as to its purpose, if it be sufficiently distinct as to the matter to which it refers.

*It seems* that no constitutional provision can be treated as merely directory and not imperative. But if any provisions of the constitution ought to be considered directory, the rule by which to ascertain what are mandatory and what directory must be those applied to statutes.

ON the 19th of April, 1859, the legislature passed an act, (*Sess. Laws of 1859, ch. 484, p. 1109,*) authorizing and directing the appointment of three commissioners by the supreme court, and authorizing such commissioners to enter into a contract with the Long Island Rail Road Company, or its assigns, for the following objects, viz: 1. The closing of the tunnel in Atlantic street. 2. The restoration of said street to its proper grade. 3. The relinquishment of its chartered right to use steam power within the city of Brooklyn. 4. The construction and operation of a substituted horse rail road between the south ferry and Jamaica. 5. That the Long Island Rail Road Company, or its assigns, should receive as compensation for compliance with such contract, and the surrender of the right to use steam, a sum not exceeding \$125,000. The act then provides that the commissioners shall assess the sum which, by the terms of the contract, is to be paid for the objects aforesaid, together with an amount sufficient to cover the expenses of the commissioners, not exceeding \$5000, upon the lots of land and premises embraced within a district in the city of Brooklyn, designated in the act. The commissioners are subjected to the rules prescribed in titles four and five of the city charter; a majority are authorized to act; they are not required to search for titles; and upon the confirmation of their report, the right to use steam is extinguished, and all laws allowing the use of steam are, from the time of such confirmation, repealed. Provision is then made for the collection of the

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assessment. On the 23d March, 1860, the legislature passed an amendatory act, (*Sess. Laws of 1860, ch. 100, p. 173,*) modifying the provisions of the act of 1859, by providing for an assignment of the assessment list to, and the appointment of, a collector thereof, by the Long Island Rail Road Company, or its assigns; and also imposing upon the company, or its assigns, a liability for damages which any person might sustain by reason of a failure to perform the contract. On the 1st August, 1859, John Winslow, John D. Lawrence and Theodore F. King were duly appointed commissioners, at a special term of this court, upon the petition of the common council. This order was never reversed or in any way appealed from. The commissioners made their first report July 28, 1860, then heard objections, and made a final report August 16, 1861. This report was confirmed, upon appeal, at special term, September 27, 1861. On the 21st October, 1861, a writ of *certiorari* was issued, upon the application of the relators, thirty-four in number, directed to the commissioners and the Brooklyn Central and Jamaica Rail Road Company, consolidated by act, (*Session Laws of 1860, page 788,*) who are the assigns of the Long Island Rail Road Company, which writ required a return of the proceedings of the commissioners, and a variety of other papers and proceedings. Two persons, other than the relators, appealed to the general term from the order of confirmation. And the defendants gave notice of a motion to quash or supersede the *certiorari* upon the return thereto, and an affidavit served. The appeal, and the motion to quash the *certiorari*, were heard together.

*B. D. Silliman*, for the relator.

*J. W. Gilbert*, for the respondents.

*By the Court, EMOTT, J.* This *certiorari* is addressed to the commissioners appointed under the act of April 19, 1859, to provide for closing the entrances of the tunnel of the



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Long Island Rail Road Company, &c. (*Laws of 1859, page 1109,*) and to the Brooklyn Central and Jamaica Rail Road Company. It brings before us proceedings to assess certain sums upon lands of the relators, and the question which we have to determine is the validity of this assessment, or the authority of the commissioners to make it. If the statute under which they acted is unconstitutional and void, they acquired no jurisdiction, and their proceedings may be reversed or set aside, as they may be also if any step requisite, according to the act itself to confer or obtain jurisdiction, was omitted. There is also a subsequent statute in reference to this assessment, which is alleged to have vitiated it. In March, 1860, the legislature passed an act, (*Laws of 1860, p. 173,*) by which the commissioners appointed under the act of 1859, just quoted, were authorized and directed to assign the assessment made by them pursuant to that act, to the Long Island Rail Road Company, or their assigns, provided the latter would receive that transfer in lieu of money, in satisfaction of the amount to be paid them according to the agreement and the provisions of the act of 1859, for closing the tunnel and relinquishing the use of steam in Atlantic street. The company were also authorized by the same act of 1860 to appoint a collector, who should possess all the powers which would belong to a collector appointed by the commissioners as provided in the act of 1859. It appears by the return of the defendants, that an assignment of the assessments has been made to the Brooklyn Central and Jamaica Rail Road Company, who have succeeded by purchase and transfer to the rights of the Long Island Rail Road Company. It does not appear whether any collector has been appointed, or what, if any, steps have been taken for the collection of the assessments. In this proceeding, however, it is not our duty to pass upon the question of the validity of the power to appoint a collector conferred upon either the commissioners by the act of 1859, or the rail road corporation by the act of 1860, or to express an opinion as to



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the extent of the authority of such an officer. This assessment may be valid, although the machinery intended for its collection may fail. If the existence or the exercise of the authority to transfer the assessment to a rail road corporation, or to individuals, is a fatal objection to the validity of the assessment itself, it will be decisive of the present question. But an objection, constitutional or other, to the means which the act gives for the collection of the assessment, is not necessarily an objection to the assessment itself. We should not reverse the proceedings of the commissioners, if the statute provided no mode for the collection of their assessment, and we cannot be asked to do so because it gives a remedy for that purpose which is ineffectual or even unconstitutional. It is contended that the statute of 1860 is a delegation of taxing power to a corporation, and the constitutionality of such a delegation is denied. But in conferring the appointment of a collector of a tax or assessment upon any person or body of persons, no taxing power is delegated. Taxation consists in the imposition of a tax, and not in the designation of the agents for its collection; and these two functions of government or administration are as distinct as rights and remedies, in legal proceedings. It is sufficient for the present purpose, however, to say that the appointment of a collector is not brought before us by the present return, and that we perceive no reason why the attempt by the legislature to confer the power to designate such an agent or officer upon the commissioners under the act of 1859, or the rail road company to whom they have assigned this assessment according to the act of 1860, even if such an attempt were wholly ineffectual or unconstitutional, should invalidate the proceedings of the commissioners in making the assessment.

The authority and direction to assign the assessment itself to the Long Island Rail Road Company or its successors, does not afford any sound objection to the assessment. The act of 1859 provides for taxing or assessing an amount to be

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determined by commissioners, but which was not to exceed \$125,000, upon a certain district of the city of Brooklyn, for the purpose of compensating the Long Island Rail Road Company for relinquishing the use of steam power within the city limits, and for closing and leveling their tunnel. The commissioners were to make a contract with the company for these purposes, and upon compliance with this contract by the rail road company the commissioners were directed to proceed and collect the assessment, and were impliedly, if not expressly, required to pay it over when collected, to the rail road company. The act of 1860 modified the position of the parties, and the requirements of the act of 1859 in several respects. The compensation which the rail road company were to receive was made payable upon their executing the agreement to perform the various acts for which they were to be compensated, instead of requiring actual performance of these acts on their part, as a preliminary to receiving this compensation. The public and individuals who may be interested are left to their remedies upon the contract, instead of being protected by requiring its performance as a condition of payment. At the same time the commissioners are no longer required to collect the assessment, but they are to assign it to the rail road company, who are to receive it as compensation under their agreement, just as they would have received the money itself, if it had been collected. There can be no difference in the validity of the assessment itself, whether the money, when collected, is to be paid to the rail road company, or the right to receive it is assigned to them. If the state has the power to levy and collect a tax or assessment, to be paid to the rail road company for the purposes specified in the act of 1859, it has the power to direct the transfer of the assessment collectively to the same company, for the same purpose, before its payment. It is the character of the assessment, and the object to which it is appropriated, which are material, and not the manner of making it available to the corporation.

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It is objected, however, that the imposition and confirmation of this assessment is forbidden by the act relative to local improvements in the city of Brooklyn, passed April 11, 1861, (*Laws of 1861, p. 462,*) or that this latter act operates as a repeal of so much of the act of March 23, 1860, as authorizes the laying of this assessment before the Long Island Rail Road Company have entirely performed what they stipulate to do. We agree with the view taken of this question by Judge BROWN at the special term, upon the motion to confirm the report of the commissioners, and expressed in the opinion delivered by him in granting the motion. It is perfectly obvious that the act of 1861 relates to contracts for work and materials upon streets and avenues, made by direction of the common council, in the ordinary administration of the municipal government. It does not apply to an improvement of the description contemplated by the acts now before us, nor does it repeal or affect the special and complete provisions which these acts contain for the accomplishment of their purpose.

There is another objection stated to these proceedings, under the provisions of the act itself. This is that the commissioners did not obtain jurisdiction, because no petition by a majority of the persons to be assessed was presented to the common council as required by the first section of the act of 1859. This section provides that the common council shall, upon petition of a majority of the owners of land within the district specified in the act, make application to this court at a special term, for the appointment of commissioners. It was alleged by the relators, on their application for the certiorari, that no such petition can be found on the city files, and that they believe none such exists. It appears, however, by the return, that the common council determined by resolution that such a petition had been presented to them, and that they would therefore apply for the appointment of commissioners. It also appears that upon such application being made to this court, evidence was

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exhibited to us of this fact, upon which the application was granted. Conceding that the existence of a petition by persons constituting in fact a majority of the owners within the district is a jurisdictional fact, and vital to the validity of the action of the commissioners, we are not now in a position to question the existence of that fact. It may be admitted that where the jurisdiction of a subordinate tribunal depends upon facts to be proved before themselves, and such facts are disputed, the evidence should be returned to a certiorari, and may be examined to see whether the fact be established. (*The People v. Goodwin*, 1 *Seld.* 568.) What amount of proof the court will require, or how far upon such a re-examination it will consider a question of the preponderance of evidence, may be a farther question. (See 21 *Barb.* 656; 1 *Hill*, 195; 4 *id.* 598.) But this rule only applies in the present case to matters required to be proved before the commissioners themselves. The writ is directed to them; and as they were not called to decide that the requisite number of owners had petitioned the common council to ask the court for their appointment, so they had no evidence before them to establish that fact. They return the proceedings which resulted in their appointment, by which it appears that both the common council and this court, at special term, determined that such a petition, sufficient in form and character, had been presented. These determinations must necessarily be conclusive in this proceeding, for we have no means of questioning or ascertaining their correctness, if we were disposed to do so.

The main question is the question of the constitutionality of the statutes under which these proceedings have been had, and especially of the act of 1859; and I proceed to examine the objections to these statutes. It is contended, in the first place, that they are in conflict with the 16th section of the 3d article of the constitution, which declares that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." The counsel for the defendants objected very

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earnestly on this argument, as he had done on a previous occasion in another case, to the view which was taken of this constitutional provision in the cases of *The Town of Fishkill v. The Fishkill and Beekman Plank Road Co.* (22 Barb. 643,) and *The People v. The Same*, (27 id. 445.) He urged upon us a refined construction and a narrow application of the provision, which would deprive it, I think, of all practical importance. With respect to the proposition that the clause in the constitution had no other object in question, and was intended to go no farther, than to prevent an improper combination of different subjects into one law, it is sufficient to observe that this object would have been accomplished by the prohibition contained in the first clause of the section, which relates to the substance of the act, without adding the subsequent injunction as to what the title shall express. It is not easy to see for what purpose the latter part of the section was intended, unless as Judge Gardiner said in the case of *The Sun Mutual Ins. Co. v. The Mayor of N. Y.*, (4 Seld. 253,) “that neither the members of the legislature, nor the public, should be misled by the title.”

It is said that this provision of the constitution is merely directory, and only establishes a rule of legislative practice. In the opinion delivered in this court in *The People v. The Supervisors of Orange County*, (27 Barb. 575,) it was intimated that it might become necessary to apply such a construction to certain portions of the constitution. This view was not however adopted by the court, nor even by the opinion, nor was it indicated as any thing more than what might become the dictate of necessity, to relieve the legislation of the state of insuperable embarrassments. It would be law for an extreme case, if it should ever be laid down as law at all. I am not aware that any court in this state has yet felt constrained or authorized to hold any provision of the constitution to be merely directory. As was noticed in the case of the *The People v. The Supervisors of Orange County*, (*supra*,) Judge Willard, in delivering the opinion in the court of appeals in *The People v. The Supervisors of Chenango*, (4 Seld.

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328,) says that the provision of the constitution requiring the question upon the final passage of a bill to be taken immediately, and the ayes and noes to be entered in the journal, is merely directory. This must be observed to be his individual opinion only; but even if it be correct, it cannot be decisive of the construction of the clause now in question. The direction which Judge Willard was discussing, related to legislative practice exclusively; to the time and manner of taking and recording the vote of the legislature on the passage of a bill, and speaks exclusively of a bill upon its passage. The clause now in question relates to the form and the substance of the bill itself, and refers to it as and after it is passed by the legislature. I think it will be found, upon full consideration, to be difficult to treat any constitutional provision as merely directory and not imperative. At all events, it is difficult to hold that the requirement of this section of the constitution, as to the title and the contents of local bills passed by the legislature, are of such a character, without applying a similar construction to other clauses which plainly require, and in some instances have received judicially, a different interpretation. Not to quote other instances, the 13th section of the 8th article, which requires that every law which imposes a tax shall distinctly state the tax and the object to which it is to be applied, is a regulation of a class of general laws, of a similar nature to that which the clause we are now considering applies to local legislation. In the *Orange county tax case*, (27 Barb. 575,) in this court, and in the court of appeals, (17 N. Y. Rep. 281,) this provision was construed as obligatory, the suggestion in the opinion to which I have referred was not followed, and the validity of the law then in question was determined upon its conformity to what is there required. In the still more recent case of *Brewster v. The City of Syracuse*, (19 N. Y. Rep. 116,) the provision now before us was in like manner assumed to be obligatory, and the law in question shown to satisfy its demands. If the doctrine contended for by the defendant's

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counsel be sound, the court of appeals might have adopted in these cases the intimation of Judge Willard, in the Chenango case, and without considering whether the law conformed to the constitutional provision, have held it sufficient, because a want of conformity would not invalidate it.

A distinction between the cases is attempted for the reason that the clause we are now considering speaks of a "bill" instead of a law. It will be found upon examination of the constitution that the terms law, bill and act are used somewhat indefinitely, through the instrument. Section 14 of article 3, provides that no law shall be enacted except by bill; and the next section is to the effect that no *bill* shall be passed unless by the assent of a majority of all the members elected; which is as imperative as if it had said that no law should be passed unless by such assent. Then follows the section now in question, and it will be observed that this reads not merely no private or local bill, but no private or local bill, which may be passed by the legislature, shall embrace more than one subject. The constitution is undoubtedly prescribing the mode of legislation and speaking of its stages, and this may be the reason of the use of the term bill; but still a bill passed by the legislature is a law, and there is little room for criticism upon the difference in the two phrases. In the 12th section of the 7th or financial article of the constitution, the terms law and bill are used in reference to the same enactment, as to its passage by the legislature, and its sanction by the people. The supreme court of Ohio have held, in a case reported in 6 *Ohio Rep.* 176, that a provision in the constitution of that state, to the effect that every bill shall be fully and distinctly read on three different days, and no bill shall contain more than one subject, which shall be clearly expressed in its title, was directory only, and a mere rule of legislative practice. There is a distinction between that case and this, because the clause in the constitution of New York, which we are considering, speaks of every private bill which may be passed by the legislature, and therefore does not refer



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exclusively to bills on their passage. To which may be added, the consideration that the accompanying provisions of the constitution of Ohio do undoubtedly relate to and regulate a matter of mere practice in a legislative body, the reading of bills. The directions of the constitution of New York are of a different nature, regulating the contents or the frame of bills or laws, or the vote by which these must be passed, and the publicity of that vote. If any constitutional provisions ought to be considered directory, upon which I entertain great doubt, the rules by which to ascertain what are mandatory and what directory, must be those applied to statutes. There is perhaps no question in the law upon which the cases are more conflicting, or upon which it is more difficult to obtain definite and uniform rules, than this of the imperative or permissive character of statutes. The decisions will be found to have been dictated more by the inconveniences or the supposed necessities of cases, than by any uniform and intelligible principle of construction. It will at once be manifest how dangerous such a mode of construction would become, if applied to the fundamental law of the state, and how the whole structure and workings of the government might be put at the mercy of the fears or the fancies of judges. Even in respect to statutes, however, the cases in which they have been held to be directory will be found to be, in general, cases of regulations respecting the time or the precise mode of doing the act in question, and not affecting its substance, or the time or mode of doing some thing preliminary to or connected with it. It will be difficult to find authority for holding that even a statutory provision referring to the substance of the matter in question is not imperative; and whatever rule may be applied to some other parts of the present constitution, this respecting the contents and the titles of laws affects too nearly their substance to be safely construed by such a rule.

I have considered the question of the character of the constitutional provision with greater particularity in consequence



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of the intimation which was thrown out in *the Orange county tax case*. Perhaps it was unnecessary to have done so, inasmuch as we are all of opinion that the statutes now in question are not open to any objection on the ground of this constitutional requirement. The title of the act of 1859 is, "An act to provide for the closing of the entrances of the tunnel of the Long Island Rail Road Company, in Atlantic street in the city of Brooklyn, and restoring said street to its proper grade, and for the relinquishment by said company of its right to use steam power within said city." The act provides in the first two sections for the appointment of commissioners to enter into a contract with the Long Island Rail Road Company, or its assigns, that they will close the tunnel in Atlantic street, will level the street to its grade, and will relinquish the use of steam power within the city, and that they shall receive a compensation for these acts, to be determined by the commissioners, and to be by them assessed upon the lands within a certain district. The third and fourth sections also contain somewhat particular and minute directions as to the provisions of the contract with the rail road company. They are to lay rails upon the surface of the street when graded, and to run horse cars upon them. The times and manner of running such horse cars, and the rates of fares, are specified, and the company are required to provide for carrying freight over the road, but not to carry any freight which the common council may declare a nuisance. Power is given to the common council to control the fares and the management of the road, as they are authorized to do in the case of existing city rail roads. At the time of the passage of this act, the Long Island Rail Road Company possessed and exercised the right to transport passengers and freight over a rail road through Atlantic street in cars propelled by steam. This rail way ran through a tunnel which had been constructed in the street, and which obstructed and interfered with its use, as did also the use of steam power. The purpose of this act of the legislature was to provide for clos-

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ing the tunnel, and grading the street, and for the relinquishment of the use of steam power in the transportation of persons and property over the railway. This is the general "subject" of the act. The assessment which is in controversy is directed by the act to be laid for the purpose of compensating the Long Island Rail Road Company, for the expense which they would incur in removing the tunnel and grading the street, and for the relinquishment of their right to steam power within the city. The provisions of the statute under which the present assessment was made, simply indicate the manner in which the means are to be furnished to make this compensation to the rail road company. The means by which any object is to be effected are a part of one general subject with the object itself. If an act of the legislature is passed to effect the object, the means for that purpose may properly, if they must not necessarily, be contained in the act, and it is sufficient that the title of the act describe the object to be accomplished, without specifying the means. In the case of *The Sun Mutual Ins. Co. v. The Mayor of New York*, (5 Sand. S. C. R. 10,) Judge Oakley said: "The raising a tax and its collection and application may most reasonably be considered one subject." It is equally plain that the removing a tunnel built and used by a rail road company, and excluding their locomotives from the streets of Brooklyn, and providing means to pay for that removal, are one subject, and that is the subject expressed in the title of this act.

The objections to the law under the clause of the constitution which we have been considering, are directed mainly, if not entirely, against certain portions of the statute, which authorize and direct the rail road company, or its assigns, to stipulate in their contract with the commissioners that they will run horse cars over the track when laid in the street as graded, which impliedly confer the right to run such cars, and which provide for the regulation of the fares and the management of the road by the city authorities. It has

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never been held that when a local act includes more than one subject, and but one of the matters thus included is expressed in the title, the act is void in toto. In such a case the statute would be good in part and bad in part, as was the case in *The People v. The Beekman and Fishkill Plank Road*, (27 Barb. 445.) The various provisions relating to the use of horse cars, which, as is said by the counsel for the relators, confer the franchise of a horse rail road, might be invalid, and the residue of the statute, including those portions upon which this assessment rests, be valid.

But the relinquishment of the use of locomotives within the city limits involves the substitution of horse power, and the regulations and permissions respecting this, which the act contains, are incidental to the change. It may be that the use of cars drawn by horses, and taking up and setting down passengers at any point, may be highly advantageous to the company, but so it may also be to the public. Either way it is but another mode of using an existing franchise, for the company possessed the right to perform the same service with cars drawn by steam. The same remark applies to the provisions for the regulation of the freight and passenger business upon the rail road outside the city limits. These are incidental to the change of motive power and the consequent change in the manner of conducting the business of the road. It is no objection to the act, and introduces no new subject into it, that those provisions are to extend as well to the assigns of the Long Island Rail Road Company, as to that company itself. If this corporation can make and have made a valid transfer of its franchise, and its property in the tunnel and track, or of any or all its franchises, its assignee should be included within the provisions of a statute intended to change so materially the rights and relations of the public, and the owners of these franchises and rights of property.

With respect to the statute of 1860, I have already said that we are not required to pass upon the validity of the ap-

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pointment, or the extent of the authority of the collector designated according to its provisions. Whatever might be our views on such a question, they would not be decisive of the validity of the residue of the act. In respect to the subject of this statute, it is not seriously contended that it is not single, but the objection is, that it is not expressed by the title of the act. If we were to listen to such a criticism as this, however, we should be led into a field of argument where the validity of legislative enactments would be made to depend, not upon the falsity or the duplicity of their provisions or their titles, but upon the particularity or the detail with which the titles were framed. Such cannot be the purpose of the constitution. It is sufficient if the general subject of the law be stated, and nothing is more frequent than to describe an act as an act in relation to that subject. Such is the title of this law, "An act in relation to the collection, payment and application of certain &c. assessments in the city of Brooklyn;" and although greater particularity would have given more definite information of the contents of the law, this general title sufficiently expresses its subject.

It must not be overlooked, that the constitution demands that the title of an act shall express the *subject*, not the *object*, of the act. It is the matter to which the statute relates, and with which it deals, and not what it proposes to do, which is to be found in the title. It is no constitutional objection to a statute, that its title is vague or unmeaning as to its purpose, if it be sufficiently distinct as to the matter to which it refers. In the language of Judge Johnson in *Brewster v. Syracuse*, (19 N. Y. Rep. 116,) the degree of particularity with which the title is to express the subject, rests in the discretion of the legislature. An abstract of the law is not required in the title.

The relators also contend strenuously that the acts in question are unconstitutional, because they authorize the taking of private property for a purpose not sanctioned by the constitution, and in a manner which that instrument forbids.

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The statute, through the action of the commission which it creates, operates upon the property of the rail road company, their tunnel and their franchises, and upon the property of individuals who, like the relators, own real estate within the district designated by the provisions of the act. As far as the rail road company is concerned, it does not lie with the relators to object to the manner or the purpose for which they are to be deprived of any rights of property. Besides this, the rail road company are to agree to the surrender of any rights of which they are to be divested, and have in fact agreed to such a surrender, before the statute could have any effect upon them. It is with them a simple matter of contract, and they are bound to comply with this as they would with any other contract. Whatever property they have parted with has been taken by their own consent. It was suggested that some easement or right in the street was also taken from the owners of the land within its limits. But there was no right or interest of any kind taken from such proprietors, if any of the relators are among them, of which we have no evidence, nor any additional servitude or easement imposed upon their lands, by removing an existing railway from a covered tunnel to the surface of the street, and changing its motive power from steam to horses.

The property of the relators is undoubtedly to be taken<sup>7</sup> compulsorily by the assessment authorized by the act. But it is not by an exercise of the right of eminent domain that this is done. The theory of this act is, that the removal of the tunnel and of the use of locomotives from Atlantic street would be a benefit to the adjacent property, and that the expense of restoring the street to its grade, and the loss to the rail road company in discontinuing running their trains by steam to the foot of the street, should be paid by the owners of such adjacent property. The courts have nothing to do with the correctness or incorrectness of this legislative opinion, and must assume the fact to be as the legislature assume or declare it. The statute proceeds to describe and create a

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district, and to provide for assessing the amount of this damage and expenditure upon the property in that district. This is clearly a legitimate exercise of the taxing power, under the doctrines of the leading case of *The People v. The Mayor of Brooklyn*, (4 Comst. 419,) and *Brewster v. The City of Syracuse*, (19 N. Y. Rep. 116.) The wisdom or justice of the taxation is not a subject of judicial inquiry, nor is the purpose for which the tax is to be imposed. The legislature are not confined in such taxation to existing political or civil districts. They may create a district for the purpose of taxation or assessment, as they did in both the cases cited. They may impose the tax equally or *pro rata* upon all the property in the district thus formed *pro re nata*, as was done in the Syracuse case, or upon a rule of estimated benefit to different owners or individuals, as in the well known Brooklyn case, and in that respect this case resembles its predecessor. The proceeds of the assessment may be applied to some public or quasi public purpose, or to compensation or the redress of individuals. In this respect the ✓ Syracuse case goes beyond what is called for here; for there the assessment was levied upon a portion of the city, to remunerate a contractor for his loss in constructing a sewer, under a contract which had proved unfortunate. The validity of such an assessment as the present, as an exercise of the taxing power, is no longer an open question in this state, and we cannot be expected to delay in discussing it.

These considerations also dispose of the objection that the power of taxing the relators' property is to be exercised in an unconstitutional manner, because the statute permits two of the three commissioners to act in the discharge of their duties. If these duties consisted in ascertaining the compensation to be made for private property to be taken for public use, by virtue of the right of eminent domain, such a question as that indicated by this objection might arise under section 7 of article 1 of the constitution. But since the functions of these commissioners are simply to assess and

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impose a tax, these provisions of the constitution have no application, and it is unnecessary to consider how far a statute providing for an exercise of the right of eminent domain might be exposed to animadversion, for authorizing a majority of the commissioners to do all things required of the commissioners. There is no constitutional requirement that any number of commissioners or other officers should act in assessing or distributing a tax. The manner of exercising this function of government is left wholly to the discretion of the government itself.

We have thus gone through with the various objections to these proceedings without finding that any of them are valid, and we have therefore arrived at the conclusion that the proceedings must be affirmed with costs.

[KINGS GENERAL TERM, February 10, 1862. *Emott, Brown and Scrugham*, Justices.]

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Whenever a vendor has manifested an intention not to rely on his lien upon the lands sold, for the purchase money, he will be considered as having waived it.

So if a vendor, for a portion of the purchase money, agrees to take a conveyance of other property, and a deed of such property is accordingly executed by the vendee, and delivered in escrow, the lien of the vendor will be gone.

If, in such a case, the depositary refuses to deliver the deed, the remedy of the vendor is upon the agreement of sale between him and the purchaser, to compel the delivery of the deed.

THE plaintiff owned a store and lot in Atlantic street, Brooklyn, valued at \$30,000, which was subject to incumbrances. The defendant owned a house and lot on President street, unincumbered, valued at \$5100. The parties agreed to exchange these properties; the defendant to pay the difference in such values, by assuming a mortgage on the

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Atlantic street property, assigning a chattel mortgage and paying a balance in cash; the properties to be respectively conveyed, free from incumbrance, except the mortgage so assumed. The plaintiff executed and delivered a deed of the Atlantic street property, subject to the mortgage. The defendant assigned the chattel mortgage, paid the balance in cash, and put a deed for the Pacific street property in the hands of Henry Alker, *in escrow*. So far, the facts are undisputed. The plaintiff claimed that the only condition of the escrow was, that he should cause two judgments for about \$4000, which were a lien on the Atlantic street property, to be satisfied or released. The defendant claimed that the escrow was upon the further condition, that certain charges for interest, insurance, &c. should be paid. The two judgments were not satisfied of record until the 23d of January, 1860; and the defendant had no notice of such satisfaction until after the commencement of this action in February, 1860. The difference between the parties, respecting the claims of the defendant against the plaintiff, has never been adjusted. The defendant put the plaintiff in possession of the house and lot on President street, at about the date of the agreement; and the latter has ever since been in possession, letting and insuring the house, altering it and receiving the rents, and has made a contract in writing to sell the house to his tenant. The complaint was dismissed, on the ground that there was no pecuniary debt, and no equitable mortgage to foreclose. The plaintiff appealed from the judgment.

*B. W. Bonney*, for the appellant.

*J. M. Van Cott*, for the respondent.

*By the Court*, EMOTT, J. The only question in this case is whether the plaintiff is entitled to a lien as vendor, upon the property which he conveyed to the defendant at the corner of Atlantic and Clinton streets, in Brooklyn, for that por-



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tion of the price which he alleges to be unpaid. Whether the plaintiff can recover this portion of the price in money of the defendant is a different inquiry, and would be determined upon different principles. It would be plainly unjust in a case like the present, brought to assert a specific equitable right, and to enforce the corresponding remedy, if we are satisfied that such a right does not exist, to give the plaintiff a money judgment, carrying with it the costs of an action, which was defended to resist the enforcement of the lien, and would have been differently defended, or perhaps would not have been defended at all, if its purpose had been simply to recover a judgment for the consideration money of the sale.

The plaintiff was nonsuited at the trial, and we are therefore to assume the case made by his evidence as true. Taking that statement of the facts, they are substantially these: In May, 1858, the parties made a verbal agreement for a sale or exchange of real estate. The plaintiff agreed to sell and convey to the defendant a store and lot on Atlantic street, Brooklyn. The consideration named in the deed, or the price or value put upon this property, was thirty thousand dollars. Of this, a part was to be paid by assuming certain existing incumbrances on the property; a part was to be paid by an assignment of a chattel mortgage and debt against a third party; a part was to be paid in cash; and for the residue, \$5100, the defendant was to convey to the plaintiff a house and lot in President street, valued at that sum. The plaintiff executed a conveyance of the Atlantic street property to the defendant, on the 16th of June, 1858. On the same day the defendant paid the money which was stipulated, and assigned the chattel mortgage. The specified incumbrances on the plaintiff's land were at the same time assumed by the defendant, by the acceptance of the deed with a suitable clause inserted in it. The defendant was ready to convey to the plaintiff, or to a person designated by him, the house in President street, which was to satisfy the residue of the consideration. But it appeared that there were incumbrances

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against the Atlantic street property, beyond those which the defendant was to assume, and that the plaintiff had been unable to remove them. The deed of the President street property was therefore, for the protection of the defendant, delivered to a Mr. Alker who was his attorney, upon condition that all incumbrances upon the Atlantic street property, other than those assumed by the defendant, should be removed. When this should be done, Alker was to deliver the deed to the plaintiff. The plaintiff went into possession of the property in President street, repaired it, rented it, collected the rents mainly, and altogether since 1859, and has contracted to sell it. In July, 1858, the plaintiff procured releases of the Atlantic street property from the judgments, and by his attorney, Mr. Husson, tendered them to the defendant and to Alker the depository of the deed, but the deed was not delivered or given up. In January, 1860, the plaintiff procured these incumbrances to be canceled of record, and again called for the deed which had been left in escrow. The delivery of the deed was still refused, and the defendant stated that he had taken it out of Alker's possession. Both Alker and the defendant refused to give up the deed until certain other claims of the defendant were satisfied.

The lien of a vendor upon the estate conveyed, for the purchase money of that estate until it is paid, rests upon the doctrine that it is inequitable that the purchaser should have the land, and yet refuse to pay the consideration. The doctrine of such a lien on lands sold is an anomaly. There is the same equity in the case of a sale of chattels, but no such doctrine obtains in reference to these. The lien of a vendor of real estate, however, is perfectly recognized, and the general rule creating it is never denied. But it is subject to this marked qualification, that whenever the vendor has manifested an intention not to rely upon his lien on the lands sold, for the purchase money, he is considered to have waived his lien. Farther, it is well settled that whenever any distinct or independent security is taken, as by a mortgage of other

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land, or the responsibility of a third person, the lien is considered as waived. Such a distinct and independent security, in the language of an eminent writer, is evidence that he did not trust to the estate as a pledge for his money. (*Sugd. Vend.* p. 861.) Notwithstanding the doubts of Lord Eldon on this point, in the noted case of *Mackreth v. Symmons*, (15 *Ves.* 349,) this doctrine is now settled, both in England and in this country. (*See Fish v. Howland*, 1 *Paige*, 20, 30.) Assuming in the present case that this is a contract for the sale of the plaintiff's property at a specified price, it will be seen that if the purchase money had been secured by a mortgage upon the President street property, there could have been no lien asserted or obtained by the plaintiff upon the Atlantic street lot. So if the defendant had merely agreed to pay \$5100 for the plaintiff's land, and the plaintiff had taken a conveyance, in any form, of the house and lot in President street, to secure it, the inference of the law would be that he intended to rely on that security, and not on his lien. Upon similar principles a lien will not be raised to protect a vendor, where his conveyance is made in consideration of covenants for the payment of annuities, or of stock or securities substituted for the price. (*See Nairn v. Prowse*, 6 *Ves.* 752; *Clark v. Royle*, 3 *Sim.* 499; *Parrott v. Sweetland*, 3 *Myl. & Keene*, 655.) But this case must fall under one or the other of these heads, and either way the court cannot assume that the vendor intended to rely upon his lien. If the \$5100 is to be regarded as a price payable in money, the conveyance of the President street property was a security for its payment, of at least as high a character as a mortgage, and must be fatal to the existence of any lien upon the estate sold. If, on the other hand, the conveyance by the defendant is to be regarded as a substitute and not a security for purchase money, it is, if possible, still plainer that no lien exists.

It does not weaken the force of this objection to the plaintiff's case, that by the misconduct of Alker the depositary,

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or of the defendant, the plaintiff has been prevented from receiving the benefit, or at least the full benefit, of the property which was to be the security, or more correctly, the payment of his price. It nevertheless remains that he received the possession of the property, with the delivery of the deed in escrow, and relied upon that deed and upon the fidelity and good conduct of the agent selected by both parties as its depositary, for the payment of his purchase money. Assuming the state of facts which appeared upon this part of the case when the nonsuit was granted, the plaintiff made out a right to the delivery to himself of the deed in escrow, and if he did not establish in that way a complete title to the land, he had at any rate a perfect remedy to compel the delivery of the deed.

It need not be denied, that if by the fraud of the vendee a part of the purchase money remains unpaid, when the vendor supposed it had been paid at the time, a lien may be asserted for that portion. That is the doctrine declared by Chancellor Walworth in *Bradley v. Bosley*, (1 Barb. Ch. Rep. 125, 152.) If in the present case the defendant had fraudulently represented that he was the owner of a house and lot worth \$5100, and so induced the plaintiff to accept the conveyance of it in payment of that sum, when in reality no such property existed, or he was not its owner, or if he had fraudulently misrepresented its value, or his title, the result would have been that the purchase money would have remained unpaid *pro tanto*, by the fraud of the purchaser, and the court might have seen no reason to suppose that the ordinary lien was relinquished or waived.

But the plaintiff is embarrassed here, not by any fraud of his vendee in the sale or the payment made at the time, but by the misconduct of a third party in respect to the security, or the mode of payment which he accepted. His grievance is not that the defendant did not pay him, because the payment was completed by the delivery of the deed, but that he has prevented the completion of the transaction

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through which the payment was to be made, by inducing the depositary of the deed to refuse to perform his duty. The right of the plaintiff is to have this duty performed, and the transaction thus completed, and his remedy is upon the agreement for the delivery of the deed, and not to enforce the equities which might have grown out of the original contract of sale, if the conveyance, with the accompanying agreement for its delivery, had not been substituted for the payment of the purchase money.

The judge at special term was correct in holding, that no case was shown here for the enforcement of a vendor's lien, and his judgment must be affirmed with cost.

[KINGS GENERAL TERM, February 10, 1862. *Emott, Brown and Scrugham*, Justices.]

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CROFUT vs. THE BROOKLYN FERRY COMPANY.

The jurisdiction of the city court of Brooklyn being declared, by the act establishing such court, to extend to actions against corporations created under the laws of the state and transacting their general business within said city, or established by law therein; *Held* that such court had jurisdiction of an action brought against the Brooklyn Ferry Company, to recover damages for an injury to the plaintiff's boat, caused by a collision.

*Held also*, that in such an action, it was erroneous to ask the pilot of the defendants' boat, "was the collision caused by any negligence of yours;" and again, "From what you discovered of the tug in coming down, was she in the fault;" these inquiries calling for the *opinion* of the witness upon the questions put in issue by the pleadings, and which were to be determined by the jury.

**A**PPEAL from a judgment of the city court of Brooklyn, entered upon the verdict of a jury. The action was brought to recover for damages to the canal boat J. L. Page, belonging to the plaintiff, alleged to have occurred on the 2d day of December, 1859, from a collision with the ferry boat Canada, on the waters of the East river, in the harbor of

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New York, while the Canada was on a trip from Brooklyn to New York, through the wrongful, careless and negligent conduct of the defendant, and without any fault of the plaintiff. Before the jury was empaneled, the counsel for the defendant moved to dismiss the complaint, for the want of jurisdiction in this court over the action, because it was a subject wholly within the jurisdiction of admiralty, and because the complaint did not state facts sufficient to constitute a cause of action, and because it appeared by the complaint that the cause of action did not arise within the city of Brooklyn. The court overruled the objection. On the testimony being closed, the defendant's counsel renewed the motion for nonsuit, on the same grounds as before, and upon the further ground that the plaintiff had not proved that the defendant was a corporation transacting its general business in the city of Brooklyn, or established by law therein. The court denied the motion, and the defendant's counsel excepted. The jury found a verdict in favor of the plaintiff, and assessed his damages at \$1400. The court thereupon, on the motion of the defendant's counsel, granted a stay of proceedings in the case, with liberty to move for a new trial upon the judge's minutes. At the same term of the court, a motion was made by the defendant's counsel, on the judge's minutes, to set aside the verdict, and for a new trial upon the exceptions taken by the defendant at the trial, and upon the ground of the insufficiency of evidence to warrant said verdict, and upon the the ground of excessive damages. Which motion, after argument, was denied by the court, with costs, and an order to that effect made; from which order, and the judgment entered on the verdict, the defendant appealed.

*C. C. Egan*, for the appellant. I. The court should have dismissed the complaint on the defendant's motion, before the jury were empaneled. (1.) For want of jurisdiction in the court over the action. It is an action over which the courts of admiralty have jurisdiction, exclusive of inferior

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courts of limited local jurisdiction, by statute. (*Benedict's Admiralty*, p. 175, § 312. *U. S. Supreme Court*, rule 157, 5 *How. Rep.* 441. *Davies' Rep.* 193, 360. 7 *Jurist*, 999.) Because it appears from the complaint that the cause of action did not arise within the city of Brooklyn, but on the waters of the East river, in the harbor of New York. The boundary of the county of New York is low water mark on Long Island shore. (1 *R. S.* 5th ed. 130.) The county of Kings is bounded easterly by Queens county, and northerly by the county of New York. (*Id.*) The city of Brooklyn comprises all that part of the county of Kings bounded easterly by the town of Newtown, Queens county, south by the towns of New Lots, Flatbush and New Utrecht, and west by the town of New Utrecht and the bay of New York, and north by the East river. (*Laws of 1854*, ch. 384, tit. 1, § 1, p. 829.) The act creating the city court of Brooklyn, (*Laws of 1849*, chap. 125, p. 170,) declares that the jurisdiction of the court shall extend, 1st. To the actions enumerated in section 103 of the code of procedure, when the cause of action shall have arisen, or the subject of the action shall be situated, within the said city. 2d. To all other actions where all the defendants shall reside or be personally served with the summons within said city. 3d. To actions against corporations created under the laws of this state, and transacting their general business within said city, or established by law therein. The reference is to section 103 of the code of 1848, which enumerates, among other actions, the following: "5. For injuries to the person or personal property." Therefore, for this court to acquire jurisdiction of this action, it is necessary that the cause of action should have arisen within the city of Brooklyn, and that the defendant should be a corporation transacting its general business or established by law therein. (2.) Because the complaint did not state facts sufficient to constitute a cause of action. The complaint does not allege that the defendant is a corporation transacting its general business in the city of Brooklyn or established



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by law therein, or that the cause of action arose within that city. The city court of Brooklyn being a court of limited jurisdiction, it is necessary that the complaint should affirmatively show that it has jurisdiction of the action. (*Simons v. De Bare*, 4 *Bosw.* 547. *Frees v. Ford*, 2 *Selden*, 176. *Bloom v. Burdick*, 1 *Hill*, 139. *Kundolf v. Thalheimer*, 2 *Kern.* 593.)

II. The service of the summons within the city of Brooklyn, upon a defendant, in an action of this nature, even though the defendant is a resident of said city, or a corporation transacting its general business, or established by law in said city, cannot confer jurisdiction upon this court, unless the cause of action arose in said city. (*Laws of 1849, ch. 125, p. 170, establishing the city court of Brooklyn.*)

III. The court should have granted the motion for nonsuit at the close of the plaintiff's testimony.

IV. The court should have granted the defendant's motion for nonsuit, after the close of the testimony: (1.) For the same reason as specified in the above points. (2.) Because the plaintiff had not proved that the defendant was a corporation *transacting its general business, or established by law in the city of Brooklyn.* The office of the company, where its books and records are kept, where the meeting of the directors and the elections of its officers are held, is in New-York. The general business of the company is that business to transact which it was chartered, in this case the running of a ferry, the business of which was transacted on the waters of the East river and harbor of New-York, which are within the limits of the city and county of New York; no part of the general business of the company was conducted in the city of Brooklyn. (*Hoyt v. Thompson*, 19 *N. Y. Rep.* 207. *Western Trans. Co. v. Scheu, Id.* 408. 1 *R. S.* 389, § 6.) The taxes upon the personal property of the defendant, viz: its capital stock, are levied and paid in the city and county of New York, where its office is. This gives the company a local status or habitation. It is not by law establish-



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ed in the city of Brooklyn, but in the county of New York. It is established by virtue of chapter 135 of the laws of 1853, and the certificate required to be filed under said act, which declares that the ferries to be run by this company shall be within the county of New York. The filing of a duplicate certificate of organization in Kings county was unnecessary, not required by the statute, and does not establish the company in said county. If a certificate of organization under said act can establish a corporation in any particular part at all, it is in such *county or counties only* in which, as stated in such certificate, a *ferry is to be established*. The duplicate certificate introduced in evidence is not sufficient proof that the company was established in the city of Brooklyn. If proof at all as to the locality of the company, it was proof only of its location in the county of Kings.

*R. H. Huntley*, for the plaintiff. I. The city court of Brooklyn had jurisdiction to try this cause. (1.) The Brooklyn Ferry Company is a corporation created under the laws of this state, and established by law in the city of Brooklyn. (2 *R. S.* 807, 5th ed. §§ 1, 2, 4, 11.) The certificate of incorporation was filed in the clerk's office of the county of Kings, and a *duplicate* certificate was filed in New York, and also in the office of the secretary of state. (2.) The city court act (*Sess. L.* 1849, p. 170, § 2, *sub.* 3) enacts that the jurisdiction of the city court of Brooklyn "shall extend to actions against corporations created under the laws of this state, and transacting their general business within said city, *or established by law therein*." (3.) The fact that this corporation elects its officers in the city of New York, does not locate it there; nor does the place where the directors meet decide or affect the location of the corporation. (*McCall v. Byram Manufacturing Company*, 6 *Conn. R.* 458.) (4.) There is no force in the objection that admiralty courts alone have jurisdiction to try causes for collision on the high seas, or on tide water. Common law courts have jurisdiction of such

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causes, as well as admiralty courts. (*Percival v. Hickey*, 18 *John.* 291, and cases there cited. 1 *U. S. Stat. at Large*, 76, § 9.)

II. The negligence of the defendant was clearly proved.

III. The damages found by the jury were not excessive.

IV. There is no ground for objection to the judge's charge, or to his refusal to charge as requested.

*By the Court*, BROWN, J. The defendant is a corporation, formed under the act of the 9th April, 1853, to authorize the formation of corporations for ferry purposes. The certificate of incorporation, which was made a part of the evidence upon the trial in the city court of Brooklyn, declares that the ferries which the associates have agreed to form, and which are to be established and conducted by the corporation, "shall run from the city of New York to the city of Brooklyn, and from the city of Brooklyn to the city of New York." Duplicates of this certificate, duly acknowledged by the associates, were filed in the office of the clerk of the county of Kings, in the office of the clerk of the city and county of New York, and also in the office of the secretary of state. This is in obedience to the directions of the first section of the act, which are, that a certificate or a copy thereof, duly executed and acknowledged, shall be filed in the clerk's office of the county or counties in which such ferry shall be or is intended to be established, and also in the office of the secretary of the state. The business of the company consists in the transportation of passengers and property from one city to the other, across the waters of the East river. It has an office and place of business in each city, where it disposes of its tickets or receives the ferriage, and where the passengers are received and forwarded to their destination. That the books of the company are kept at the office of its attorney in Beaver street, New York, where the directors sometimes meet, and that it is assessed for personal property in that city, does not determine where the corporation is estab-

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lished. If these facts were conclusive upon the question of the locus of this corporation, its place of establishment must be wholly transitory and ambulatory, and at the will of its officers; for it is just as easy for its attorney to keep his office and the books of the company, and for the directors to meet, in Jersey City as in Beaver street, New York. The certificate of incorporation, with the acts of the company in the exercise of its franchise, show where the corporation is established, and that is both in New York and Brooklyn. This ensues from the nature of the business in which it is engaged. It is a ferry company, and the waters which it crosses lie between the two cities. The ferry is established in, as well as between, the two cities. It takes passengers not from one side—as in some ferries—and lands them upon the other side of the stream; but it takes them from both sides, and lands them upon both sides. The franchise embraces the right of ferriage both ways. It must be established somewhere. It cannot be said to be located and established in one city to the exclusion of the other. It is, in fact, established in both. The jurisdiction of the city court of Brooklyn being declared to extend to actions against corporations created under the laws of the state, and transacting their general business within said city, or established by law therein, (*Sess. Laws* 1849, p. 170, § 2, *sub.* 3,) that court had jurisdiction to try the question of collision, which is the subject of controversy in this action.

The action is brought to recover damages for an injury to the canal boat *J. L. Page*, of which the plaintiff was the owner, from a collision with the defendant's ferry boat *Canada*, on the waters of the East river, on the 2d December, 1859. At the time, the *J. L. Page* was with other vessels in tow of the steam tug *Secor*, going down the river, to which she was fastened by lines in the usual manner. The collision occurred opposite the company's ferry slip or landing, on the New York side, and from 150 to 300 feet therefrom, the river being full of vessels, some twenty in all, going up slowly with

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a light wind and little tide. The Canada was on her trip from the Brooklyn side. There was evidence to show that she stopped her engine when about 400 feet from the ferry slip, and waited for the vessels to pass. There appearing to be an opening through the vessels, the Canada got under way, and passing around the stern of one of the vessels, whose sails obstructed the view and concealed the tug from the observation of the pilot of the Canada, she struck the J. L. Page at a right angle, about 35 feet from her bow, going into her about 3 feet. As soon as the pilot of the Canada discovered the tug with her tow he reversed her engine, but too late to prevent the collision. Both the ferry boat and the tug boat had stopped, and were stationary just before the collision occurred, and the principal point litigated at the trial was, which of the two got under way first. Because it is said that if the ferry boat had put herself under headway before the tug, and while the latter was lying still, it was negligence in the latter to run across the bows or course of a vessel under headway at the rate of four miles per hour, which was the speed of the ferry boat at the time of the collision. There was proof on both sides of this question; the plaintiff's witnesses averring that the tug, with her tow, was under way before the Canada resumed her motion, while the defendant's witnesses averred the reverse of this fact. This fact was to be determined exclusively by the jury, and they found in favor of the view maintained by the plaintiff, in which I think they are supported by the weight of the evidence. It was the duty of the Canada, after she stopped her engine, not to have resumed her headway until the passage in front of her was clear and open—so open, at least, that her pilot might have seen what was behind the canvass which obstructed his view. In place of doing this, he attempted to pass around the stern of one of the fleet of vessels in his front, and in so doing, her pilot says, "after we started and went ahead 50 feet, we were shut off by the sails of these vessels, so that I could not see the Secor until within

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50 feet of her, after we came out from behind these vessels." This was an act of sheer negligence, and was doubtless the principal cause of the collision.

Two questions were asked of John Purdy, a witness for the defendant, which were objected to by the plaintiff and overruled. They may be disposed of together. He was first asked, "Was that collision caused by any negligence of yours?" And then again, "From what you discovered of the tug in coming down, was she in fault, and how?" The purpose of these inquiries was nothing less than to elicit the opinion of the witness upon the questions put in issue by the pleadings, and which were to be determined by the jury from all the facts disclosed in the course of the trial. The evidence was properly rejected.

In regard to the amount of the damages, they may be large, but they are not excessive. They are supported by the evidence; at least there is evidence upon which the jury had a right to rely in ascertaining the amount of the recovery. The estimates of the witnesses varied from \$700 to \$1600. The jury found \$1400. as the true measure of damages.

There is nothing in the charge of the court, or in the refusal to charge as requested, which is open to any legal exception.

The judgment should be affirmed.

[KINGS GENERAL TERM, February 10, 1862. *Emott, Brown and Lott*, Justices.]

OTIS, Receiver, &c. *vs.* HARRISON.

Where, upon contracts of insurance made after the act of June 25, 1853, providing for the incorporation of fire insurance companies, took effect, premium notes were given by the insured, each being for twenty times the amount of the premium paid in cash; *Held* that the notes were within the prohibition of the 18th section of the act, which declares that in no case shall a premium note be more than five times the whole amount of the cash premium; and that they were therefore illegal and void, and could not be enforced against the maker.

*Held, also*, that by force of the 20th section of the act of 1853, the prohibition in regard to the amount of the premium notes, contained in the 18th section, applies to, and is to be observed by, companies formed under the act of April 10, 1849, and which were in existence at the time the act of 1853 took effect.

*Held, further*, that the giving of such notes was an act not merely *ultra vires*, but was an act expressly prohibited by law.

No right can be derived from any agreement made in express opposition to the laws of the place where it is made.

The act of April 9, 1859, to amend the charter of the Poughkeepsie Fire Insurance Company, does not affect the question of the validity of premium notes previously taken by that company, in violation of the act of 1853.

**A**CTION by the plaintiff as receiver of the Poughkeepsie Insurance Company, upon four premium notes, made by the defendant upon effecting insurances with the company. On the trial the plaintiff was nonsuited, on the sole and only ground that the notes in suit exceeded five times in amount the amount of cash premium paid. And the exceptions were ordered to be heard in the first instance at general term.

*H. A. Nelson*, for the plaintiff.

*A. J. Parker*, for the defendant.

*By the Court*, BROWN, J. The plaintiff is the receiver of the Poughkeepsie Insurance Company, a corporation organized August 16, 1850, under the provisions of the act of the 10th of April, 1849, for the purpose of carrying on the business of insurance. The company was dissolved by an order

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made at a special term of this court, held on the 24th of April, 1860, and John H. Otis, the plaintiff, appointed the receiver of the corporation, with the usual powers to close up and settle its business and affairs. The action is brought to recover the moneys mentioned in four several promissory notes made by the defendant, and given to the company for premiums of insurance upon four policies of insurance bearing even date with the notes issued to the defendant, to wit: One note for \$400, dated September 14th, 1855; one for \$300, dated February 19th, 1856; one for \$200, dated September 14th, 1858; and one for \$300, dated February 19th, 1859. It was in proof that the policy for which the first note was given was upon a contract of insurance for three years, and for \$2000, and the cash premium paid thereon was \$20. The policy issued upon giving the second note was upon a contract for \$1500, for three years, and the cash premium paid thereon \$15. The third note was given upon a policy containing a like contract for three years, and for the sum of \$1000, and the cash premium paid thereon \$10. And the fourth note was given upon obtaining a similar policy for \$1500, and the cash premium paid thereon being \$15. So that the cash premium paid at the time of effecting the insurance upon the four policies, respectively, was just five per cent upon the sums expressed in the premium notes. Or, to express the same idea in another form, each note given upon effecting the policy of insurance was made for the payment of a sum of money twenty times greater than the sum paid at the same time as cash premium. It also appeared in evidence that losses to a considerable amount had occurred upon policies issued by the company, and for the payment of which it had become liable, and that an assessment had been made in due form upon the premium notes held by the company, including the notes in suit, for the payment of such losses. The trial was had before Mr. Justice EMOTT and a jury, at the Dutchess circuit, in April, 1861. The facts to which I have referred appeared upon the plaintiff's own

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showing, and he was nonsuited upon the ground that the notes set out in the complaint, upon which the assessment was made, were void because each of such notes exceeded five times the sum paid as cash premiums. The counsel for the plaintiff excepted, and the exceptions were ordered to be heard at the general term.

Two questions were made upon the argument: 1st. Whether the Poughkeepsie Insurance Company is subject to the act of the 25th June, 1853, to provide for the incorporation of insurance companies, and is to be governed by its provisions; and 2d. Whether the notes upon which this action is brought are within the prohibition of the 13th section of the act, and upon that account illegal and void.

The 5th section of the act of the 10th April, 1849, under which the plaintiff's insurance company was organized, after putting a limitation upon the capital of companies organized in the counties of New York and Kings, and declaring of what such capital shall consist, declared that no mutual insurance company in any other county in the state should commence business until agreements had been entered into for insurance, the premiums on which shall amount to one hundred thousand dollars, and the notes received therefor payable within twelve months from the date thereof, which were to be considered as its capital, and negotiable and collectible for the purposes of paying losses which might accrue. The act did not require the payment of any cash capital, nor the payment of any part of the premiums upon insurance effected in cash, but the business might have been prosecuted upon a capital composed exclusively of the notes of those insuring their property with the company. The 15th section declared the duration of the charters formed or extended under the act, but the legislature therein reserved the right at any time to alter, amend or repeal the act, or dissolve and provide for closing up the business and affairs of any company formed under it. The business of insurance upon such a basis was an untried experiment in this state, and experi-



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ence soon demonstrated that nothing short of a cash capital, in whole or in part, available at all times for the liquidation of losses and the execution of contracts, would fulfill one of the principal conditions of a safe, adequate and efficient system of insurance. Accordingly, when it was subjected to legislative revision and amendment, in the act to provide for the incorporation of fire insurance companies, passed June 25th, 1853, we find a provision of this kind inserted in the 13th section; that "the directors or trustees of such company shall have the right to determine the amount of the note to be given, in addition to the cash premium, by any person insured in such company; but in no case shall the note be more than five times the whole amount of the cash premium." The object of this provision is plain enough. It did not exist in the original act, and was introduced into the amendment to correct and cure an acknowledged evil. That was the want of sufficient cash capital. Its object was to insure to the companies conducting insurance upon the mutual plan, cash resources available for the payment of losses and the fulfillment of their contracts, equal to at least one-sixth part of their capital. The provisions of the 6th section evince the same purpose, by prohibiting companies organized out of the counties of New York and Kings from commencing the business until agreements shall have been entered into for insurance with at least 200 applicants, the premiums on which shall amount to \$100,000, of which \$20,000 shall have been paid in cash, and notes of solvent parties, founded on actual and bona fide applications for insurance, shall have been received for the remaining \$80,000. The prohibition then, of the 13th section, in regard to the amount of the notes taken upon issuing a policy of insurance, is clear and explicit. In no case shall the amount of the note exceed five times the amount of the cash premium. This direction and prohibition is what the legislature have thought fit to incorporate into the organic law of this class of insurance companies, and we shall consider presently the consequences which ensue

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upon its violation. It will be seen that the act of the 25th June, 1853, is not an amendment of existing statutes, by engrafting thereon new provisions and abrogating others. It is general in its purposes and provisions, substituting a system perfect and complete in itself. The 28th section repeals so much of the act of April 10th, 1849, as relates to fire and inland navigation insurance, but the repealing clause is declared not to affect the companies organized under that act. Section 20 contains provisions material to the present inquiry. It declares that such companies as may have been incorporated or extended under the act of the 10th April, 1849, "are hereby brought under all the provisions of this act, except that their capitals may continue of the amounts named in their respective charters, during the existing term thereof, and are also entitled to the privileges granted by such charter." It seems indisputable that by force of this 20th section, the prohibition in regard to the amount of the premium notes found in the 13th section, applies to and was to be observed by companies formed under the act of April 10, 1849, and which were in existence at the time the act of the 25th June, 1853, took effect. The case of *Devendorf v. Beardsley* (23 Barb. 656) is an authority upon this point, if any is needed, and settles the rule of construction, so far as this court can settle it. (See also the dictum of Mr. Justice Allen in *Thomas v. Whallon*, 31 Barb. 176.)

That the four notes in controversy are within the prohibition of the statute, is too plain for argument. They were given upon contracts of insurance made after the act of the 25th of June, 1853, took effect. They are therefore illegal and void, and cannot be enforced against the defendant. This is not a case where a corporation has exceeded its powers in making a contract not authorized by its act of incorporation, or in the purchase of property in which it was not authorized to deal. When a corporation has gone beyond its powers in the acquisition of property, or by entering into executory contracts beyond the scope of its corporate powers,

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considerations would arise in determining the validity of such acts, which have no application to the present inquiry. The distinction between an act *ultra vires* and an act expressly prohibited, is too obvious for comment. The making of the notes was forbidden by law. The directors of the insurance company were not only without the power to make such contracts of insurance with the defendant, Cornelius B. Harrison, but the act declared, in so many words, that they should not be made. In no case were they to issue policies whereby the company incurred, or were made liable to incur, a liability for losses, and take a note therefor greater in amount than five times the sum paid therefor as cash premium. This the legislature deemed to be a mode of insurance unstable, unsafe and pregnant with mischief to the people of the state, and they declared it should not be done. The directors were bound to know the organic law of the company, and this prohibition was written as a part of it. No right can be derived from any agreement made in express opposition to the laws of the place where it is made. "All contracts and agreements which have for their object any thing which is repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void ; and whenever a contract or agreement is entered into with a view to contravene any of those general principles, there is no form of words, however artfully introduced or omitted, which can prevent courts of law and equity from investigating the truth of the transaction ; for *ex turpi contractu actio non oritur* is a rule both at law and equity." (1 Com. on Cont. 30.) In *Henry v. The Bank of Salina*, (1 Comst. 83,) the rule was applied to a note discounted by the teller of a bank for his own benefit, after the bank had refused to discount it—the act being forbidden by the statute. In *Gray v. Hook*, (4 id. 449,) it was applied to an agreement in regard to an application to the appointing power of the state for an office, and the emoluments of the office. In *Pennington v Townsend*, (7 Wend. 276,) a for-

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eign incorporated company had discounted a check in this state in violation of the restraining act. The court said the act was *malum prohibitum*, and no recovery could be had. It could not be the foundation of a civil action. In *Swift v. Beers*, (3 Denio, 70,) notes made by a banking association, payable on time and with interest, were held to be illegal and void, because they were prohibited by the 4th section of the act to amend the general banking law, passed May 14th, 1840. (See also, to the same effect, *Tylee v. Yates*, 3 Barb. 222.) In *Thatcher v. Morris*, (1 Kern. 437,) the plaintiff sought to recover prize money drawn in a lottery. The court held that to enforce such a contract in the courts of this state, when by law it was forbidden, the plaintiff must aver and prove where it was made, and that by the laws of the place where made it was authorized and valid. These authorities are decisive against the plaintiff's right to recover in this action.

The counsel for the plaintiff refers to the act of the 9th April, 1859, to amend the charter of the Poughkeepsie Fire Insurance Company, as a ratification of the act of the company in regard to the notes in controversy. The first section provides for changing the name of the company; the second for the election of the directors; the third authorizes the company, under its new name, to transact the business of insurance specified in certain sections of the act of April 10, 1849; and the fourth is designed to preserve the rights and continue the liabilities of the company under its new designation. The act does not affect the question of the validity of the notes on which the plaintiff seeks to recover.

Judgment of nonsuit should be entered against the plaintiff.

[KINGS GENERAL TERM, February 10, 1862. *Emott, Brown and Scrugham*, Justices.]

SPOONER *vs.* THE BROOKLYN CITY RAIL ROAD COMPANY.

In the case of travel by passengers upon an ordinary highway, in a public conveyance—especially when the highway is a crowded city street—the possible negligence or misconduct of the owners or drivers of other vehicles, over whom the carrier has no control, is a risk which a passenger cannot cast upon the carrier, but must, so far as the latter is concerned, take upon himself.

Hence, if a passenger in a vehicle upon a city street voluntarily assumes a position which is not intended and ordinarily used for the conveyance of passengers, and which is exposed to danger from such misconduct, he himself contributes to an injury which he sustains by a collision produced by the willful or the negligent acts of a third party, without any fault in the management of the vehicle which carries him.

Under such circumstances it is well established that he cannot recover against the carrier.

THIS was an appeal by the plaintiff from an order of the city court of Brooklyn, dismissing the complaint, made on the second trial of this action. The case, upon the appeal from the judgment rendered after the first trial, is reported in 31 *Barbour*, 419. It appeared, on the second trial, that the defendants were carriers of passengers in the city of Brooklyn, using a stage sleigh for that purpose. The plaintiff took passage on one of their sleighs, to be conveyed from the corner of Bond and Fulton streets, through Fulton to Orange street. While standing on the left guard or fender of the sleigh, he was injured by a blow given to him by a coal sleigh which was in the act of passing the defendants' sleigh. The defendants' driver was driving their sleigh on the right side of the street, his horses moving slowly, and tried to avoid the collision. The coal sleigh, which was driven very fast, slid down sideways, broke the rails and the stanchions of the stage sleigh close up to the body, knocked the plaintiff off from the defendants' sleigh, and mashed him in towards the defendants' sleigh body, causing the injuries.

The foregoing and other facts having been proved, a motion was made to dismiss the complaint. The plaintiff's counsel requested the court to submit five several questions

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to the jury, viz: 1st. Whether the defendants were not guilty of negligence in constructing these foot boards, on which they carried passengers, without constructing guards for the foot boards? 2d. Whether these foot boards were not placed on their sleighs for the purpose of conveying passengers, and whether they were not unsafe for that purpose? 3d. Whether the plaintiff was not invited by the defendants to take the place on the sleigh where he stood at the time of the collision? 4th. Whether the plaintiff was himself guilty of any negligence in placing himself where he stood when injured? 5th. Whether the defendants might not have avoided the collision by care and skill at the point of the accident, and whether the injury was not occasioned by their negligence and that of their driver, in not avoiding the collision?

The complaint was dismissed, to which, and to the refusal to charge each of the foregoing requests, the plaintiff separately excepted.

*J. M. Van Cott.* for the appellant.

*G. T. Jenks,* for the defendants.

EMOTT, J. We are of opinion that this case was devoid of any evidence upon the recent, as it was upon the former trial, imputing negligence to the driver of the sleigh in which the plaintiff was riding. He was driving slowly and cautiously, and turning out of the way of the sled which came in collision with him. It was the reckless approach and the sudden turn and swing of the latter which brought the two together, and for this the defendants' driver was not to blame. The city judge correctly refused to submit to the jury whether the driver of the defendants' sleigh was guilty of negligence, or whether he might not have avoided the collision. It is possible that if he had foreseen the conduct of the driver of the coal sled which was approaching him, he might have avoided a collision, because he might have driven his own

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sleigh into such a place or position that it would have been beyond the reach of that, or of any passing vehicle. But this he was not bound to do. He was bound to exert the utmost skill and care to avoid the ordinary dangers of the road, but not to foresee or guard against the willful misconduct, or the gross negligence of others, except so far as he could do so after he was aware of the course they were pursuing.

The evidence shows very plainly the character and purpose of the part of the sleigh upon which the plaintiff was riding. It was a projecting fender, intended to protect the body and the runners of the vehicle in case of contact with other objects. The most that can be said, or that a jury could have found in respect to the use of these fenders for the conveyance of passengers, would be, that they were made of broad boards instead of rails, so that when the sleigh was full inside, persons could stand upon them, and that under such circumstances fare was collected from persons riding there. I do not say that this evidence satisfies me that these fenders were made for such a purpose; quite the contrary. But at most, the evidence can only prove what I have stated. Then the question would arise, whether the defendants are liable because they permitted a part of their vehicle to be used for conveying passengers which was exposed to danger from the carelessness of others. That the defendants were bound to furnish a safe and roadworthy vehicle, is undeniable; but that means roadworthy for its own proper use, and safe in the contingencies of travel in such use. If in the ordinary passage through the street, without encountering carelessness or misconduct on the part of other vehicles, these foot boards were insecure, if the plaintiff had been injured because he was riding upon them, without the negligence or misconduct of any other person or vehicle, the case would be different. But the responsibility of a carrier does not extend to provide a vehicle which shall be secure against the mis-

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conduct of others, he himself being free from blame in all other respects.

It is conceding too much, however, to say, that upon this evidence the jury could have found in the terms of the proposition submitted to the judge at the trial, that fenders were placed on this sleigh for the purpose of conveying passengers. If they were not placed upon the sleigh expressly for that purpose, it was the plainest negligence in the plaintiff to occupy a position upon them, contributing as this did, so materially to his injury. In the case of *Willis v. The Long Island R. R. Co.*, (32 Barb. 398,) which was cited on the argument, I said: "The essential element of negligence in such a case is a disregard of some risk which the passenger ought to anticipate." "A passenger is not bound to anticipate a collision, or that the train will be thrown from the track. He has a right to expect that he will be carried safely; that the carrier will discharge his duty; will provide a safe vehicle and an unobstructed track, and that the passengers will be exposed to no risk, but those incident to that mode of travel. It is not, in my judgment, negligence in a passenger to occupy a position which will involve increased risk to him of the consequences of negligence and misconduct of the carrier." "He cannot be charged with neglect for omitting to provide against the possible consequences of the misconduct of the carrier." It was very strenuously insisted, that these and other expressions of that opinion, and the rules laid down in that case, are inconsistent with the rulings at the trial of the present cause. The inference is sought to be drawn, that it was no more negligent for the present plaintiff to ride upon the fender of a sleigh, than it was for the plaintiff in the case referred to, to ride upon the platform of a rail road car. But it must be considered, that in the case of a rail road train there can hardly be said to be any risks that are not incident to, and inseparable from, the mode of transportation; except such as result from the negligence and misconduct of the carrier; at least, none other were considered in the case referred to.



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The carriers, the rail road company, have exclusive control, not only of the vehicle and the motive power, but of the road itself, and of all the vehicles moving upon it. A collision with another vehicle, if it occur, must be the result of their own conduct, and not, as it may be in the case of a common road, the result of the action of independent agents. The principle enunciated in the case of *Willis v. The Long Island Rail Road Company* was, that a passenger was not bound to anticipate, nor to protect himself against the consequences of the misconduct of the carrier. The risk of such misconduct—the risk of an insufficient vehicle which may break down, or its unskillful management which may destroy it—he is not to assume to be incident to travel by that conveyance. So in the case of a rail road, the danger of the existence of obstructions or imperfections of the track, or the mismanagement of other cars or trains upon the same road, which are in fact all a part of the same conveyance, is not a risk which a traveler must consider incident to the mode of conveyance. But in the case of travel upon an ordinary highway, especially when the highway is a crowded city street, every prudent man knows that he is to meet numerous vehicles, the conduct of which no one but their owner or drivers control. The carrier who is transporting him cannot control, and is under no obligation for their behavior, and their possible negligence or misconduct is a risk which the passenger cannot cast upon the carrier, but must, so far as the latter is concerned, take upon himself. If therefore a passenger in a vehicle upon a city street voluntarily assumes a position which is not that intended and ordinarily used for his conveyance, and which is exposed to danger from such misconduct, he himself contributes to an injury which he sustains by a collision produced by the willful or the negligent acts of a third party, without any fault in the management of the vehicle which carries him. Under such circumstances the rule is well established that he cannot recover against the carrier.

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We are unable to see how the plaintiff can maintain an action against the defendants for his injuries, lamentable as those injuries have been, and we must therefore affirm this judgment.

BROWN, J. concurred.

SCRUGHAM, J. dissented, on the ground that the 2d and 3d questions proposed by the plaintiffs' counsel should have been submitted to the jury. Judgment affirmed.

[KINGS GENERAL TERM, February 10, 1862. *Emott, Brown and Scrugham*, Justices.]

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THE PEOPLE, *ex rel* Peter O. Stephens, *vs.* JOHN TALLMAN, jun., Commissioner of Highways of Clarkstown, and others.

Where a commissioner of highways institutes proceedings, under the statute of 1847, (*Laws of 1847, ch. 455*), for a reassessment of the damages of a person whose land has been taken for a road, such land owner is entitled to notice of the empanneling of the jury, and of the subsequent proceedings before them.

The spirit and intention of the act, in directing the jury to hear the parties and their witnesses, requires that the parties should have notice of the proceeding; and independent of any thing in the statute, no proceeding affecting judicially the rights of another, occurring in his absence without notice, can be valid.

COMMON law certiorari, to remove proceedings had under the act of 1847 (*Laws of 1847, ch. 455*), for a reassessment of the damages of the relator, occasioned by the laying out of a highway over his land in the town of Clarkstown. The writ was directed to the defendant Clarkson, commissioner of highways, Jabez Wood, the justice of the peace before whom the proceedings were instituted, and T. L. Denoyelles, town clerk of the town. The court directed the proceedings upon all the returns to be had and conducted as those in one cause or suit.

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The People v. Tallman.

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*Hoffman & Hopper*, for the relator.

*Ferris & Weiant*, for the respondent Tallman.

*By the Court*, EMOTT, J. It appears in this case that a highway has been duly laid out over lands of the relator in the town of Clarkstown, and that his damages had been assessed by commissioners appointed by the county court. The defendant Tallman, as commissioner of highways of the town, instituted proceedings according to the statute of 1847, (*Laws of 1847, ch. 455*), for a reassessment. This statute provides (section 3) for a notice to the opposite party and the town clerk, signifying dissatisfaction with the damages, asking for a reassessment, and specifying a time when the town clerk of some adjoining town will draw a jury to reassess said damages. The proceedings in this case conformed to the statute, in these particulars. The proper notices of drawing the jury were given, and the relator attended, by counsel, at the drawing. The statute directs the town clerk to draw twelve names from a box containing the names of all the persons in the town liable to jury duty, and to deliver to the party asking a reassessment a certificate of such names. Up to this point there is no complaint of these proceedings.

The statute provides that this certificate shall be delivered by the party, within twenty-four hours, to a justice of the peace of the town, and it is his duty forthwith to issue a summons to a constable of the town, directing him to summon the persons named in the certificate at a time and place which he is to specify. Upon the appearance of such persons the justice is to draw by lot six of the number, to be the jury. They are to be sworn well and truly to reassess the damages, and they are required by the statute to take a view of the premises, and to "hear the parties and such witnesses as may be offered by the parties and sworn by said justice," and to render their verdict in writing. These di-

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rections were pursued in the present case as to summoning and empanneling the jury, the commissioner of highways being present and examining a witness, and the jury then rendered a verdict materially reducing the original assessment of damages. No notice was given to the relator of the time or place fixed by the summons for empanneling the jury, by the justice, or of any time when they would proceed to hear the parties or their evidence; nor was the relator present in person or by attorney at any proceeding after the first drawing of the twelve names by the town clerk, of which, as has been stated, he received the notice demanded by the statute. The defect in the proceedings alleged by the relator, is the want of such notice to him of the empanneling and the subsequent proceedings of the jury.

It will be observed that the statute does not in express terms require such notice; it makes no provision respecting it. The objection is therefore taken, upon general principles, that the spirit and intention of the act in directing the jury to hear the parties and their witnesses, requires that the parties should have notice of the proceeding, and that, independent of any thing in the statute, no proceeding affecting judicially the rights of another can be valid in his absence, without notice.

The provisions of the statute referred to contain a strong implication of the rule contended for by the relator; but aside from that, the rule has been clearly asserted in principle by this court. In *Bouton v. Neilson* (3 *John.* 474) the court admitted the soundness of the principle that a party could not be concluded by a judicial proceeding without notice and an opportunity to be heard, while denying its application to the issuing of a warrant by a magistrate, in a case where his action was wholly ministerial and not judicial. In *Rathbun v. Miller* (6 *id.* 281) an admeasurement of dower was set aside because the tenant had no notice of the application to the surrogate for commissioners, although the

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statute did not provide for or require any such notice. In *The Commissioners of Kinderhook v. Claw*, (15 *id.* 537,) an appeal had been taken from an order of the relators altering a road, without giving them notice of the appeal. This court reversed the order of the judges upon the appeal, because such notice had not been given, although the act regulating such appeals did not prescribe a notice in such cases. Mr. Justice Van Ness, in giving the opinion of the court, says that in every proceeding of a judicial nature both parties are entitled to be heard, and notice to both is indispensably requisite. This latter authority is also in point as to the remedy by certiorari in such a case as this.

It was contended by the counsel for the defendant, that the empanneling and proceedings of the jury are part of a continuous proceeding, which commences with the notice of the application for a jury to reassess the damages, and continues to their final verdict, and that as the relator had the notice required by the statute, of the first step, he is to be presumed to have notice of all subsequent steps. It is manifest that if this reasoning be sound, the application of the wholesome principle of general jurisprudence which has been indicated would be of no avail in such a case. It would be of little or no advantage to a party to be notified when the panel of the jury was to be formed, if he was not to be informed when the matter was to be heard, that he might present his proof. In point of fact, however, this is not one continuous judicial proceeding. The action of the town clerk, of which the relator was notified, was merely the first step towards constituting the tribunal which was to pass upon his rights. If the relator had received notice of the time and place set by the justice for the empanneling of the jury, the case would have been slightly different. But as it is, he has had notice only of the proceeding to constitute a tribunal which was to determine a question affecting his property,

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and no notice of the proceedings of that tribunal towards a judicial examination and determination of that question.

This is fatal to the proceedings brought before us by this writ, and they are reversed with costs.

[KINGS GENERAL TERM, February 10, 1862. *Emott, Brown and Scrugham*, Justices.]

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## HART and wife vs. THE CITY OF BROOKLYN.

There is a distinction between the power of municipal corporations over the carriage ways of their streets, and that which they possess over sidewalks. The absolute authority over the roadway, conferred upon the common council by the charter of the city of Brooklyn, is not possessed by them over the sidewalks; and the same responsibility cannot be imposed for the condition of the sidewalks as for that of the roadway.

A municipal corporation is not liable in damages to an individual for injuries caused by an opening in a sidewalk, made by an owner of the soil or the adjacent land, without proof of notice of the insufficiency or defect, and neglect to cause it to be remedied.

The public authorities are not to be presumed to have notice of a latent defect in the covering of an opening in a sidewalk, which was not made by them or under their direction.

Notice to the public authorities of defects or obstructions in the streets, not occasioned by their own acts, must be express, or the defects must be so notorious as to be evident to all who have occasion to pass the place or to observe the premises.

The provision of the act of April 12, 1859, prohibiting the recovery of costs against municipal corporations, unless notice of the claim has been given to the comptroller of the city before suit, is applicable to claims for damages on account of the negligence or misconduct of the city authorities, as well as to demands upon contract.

**A**PPEAL by the defendants from a judgment of the city court of Brooklyn. The action was brought to recover damages for an injury sustained by Margaretta Hart, one of the plaintiffs, in consequence of falling into a coal vault under the sidewalk, in Hicks street, Brooklyn, in June, 1859, through the grating; which, the complaint alleged, was left

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in an unsafe and dangerous condition by the defendants. The answer of the defendants admitted that they had the care of the public streets and sidewalks, but denied any liability for not repairing and keeping in order vault gratings. The plaintiffs recovered a verdict for \$1000, and the defendants appealed.

*A. McCue*, for the appellants.

*Spooner & Taber*, for the plaintiffs.

*By the Court*, EMOTT, J. The exception to the charge of the city judge is too vague and general to be of avail to the defendants. The principal question presented by the bill of exceptions, and the only question which it is necessary for us to consider, is the right to maintain the action against the city, upon the facts disclosed in the evidence.

The defendants moved for a nonsuit, when the plaintiffs closed their case, at the trial. It then appeared that Margaretta Hart, one of the plaintiffs, while passing through Hicks street, in Brooklyn, stepped upon the grate or cover of an opening of a vault in the sidewalk, and that the cover slipped or turned under her weight, in such a way as to cause her to fall into the opening, and thus to receive the injury for which she and her husband have sued the city. The city judge refused the nonsuit, and the defendants excepted. It does not appear that the plaintiffs relied at the trial, nor do they rely at present, upon an absolute and unconditional obligation of the city of Brooklyn to keep the sidewalks in good order, or to protect at all hazards the openings which are made in them by individuals for access to their vaults and cellars. Such an obligation seems to have been decided by the court of appeals to rest upon municipal corporations in reference to their streets as highways. (*Conrad v. Trustees of Ithaca*, 16 N. Y. Rep. 158, 161, and note.) But there is a distinction between the power of the present defendants, as

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well as of corporations generally, over the carriage ways of their streets, and that which they possess over sidewalks. The charter of the city of Brooklyn, title 10, section 1, gives power to the common council to repair the pavements of the public streets, that is, of the roadway exclusive of the sidewalks, at the general public expense; with regard to sidewalks, however, the only powers which I discover are contained in subdivision 22 of section 13 of title 2. Whatever repairs are made under the authority conferred by this section, are to be made at the expense of the owners of the adjoining lots. Assessments for such expenses are to be made and collected pursuant to the 4th title of the chapter, and are local and not general charges. It would seem that the city has no power to repair a sidewalk at the general expense, or to compel its repair or improvement, except in the mode indicated in this 4th title. However this may be, the absolute authority over the roadway conferred upon the common council by the charter is not possessed by them over the sidewalks, and the same responsibility cannot be imposed for the condition of the sidewalks as for that of the roadway. (*Peck v. Village of Batavia*, 32 Barb. 634.)

The theory of this action, however, is that the defendants are liable for a defective covering or an insufficient protection of an opening in a sidewalk, made by an owner of the soil or the adjacent land, when they have notice of such insufficiency or defect, and neglect to cause it to be remedied. Without inquiring to what extent this rule is applicable in cases like the present, it is sufficient to say that there was no proof of any notice to the defendants of the defect in the covering of the vault where Mrs. Hart was injured, and no evidence from which the jury should have been allowed to infer such notice. No direct or express notice was pretended, and the testimony of Mrs. Hart herself is fatal to an implication or presumption of notice. She says, in effect, that there was no difficulty or danger apparent to a person approaching or passing the grating or covering to the vault, and that she stepped



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upon it without apprehension. An examination of the place was made, after the accident, by others, who confirm her statements. Undoubtedly this relieves her of the imputation of negligence, in not foreseeing danger in walking where she did, but it also relieves the defendants of any inference or implication that they had notice of a defect which a passenger could not perceive. The public authorities are not to be presumed to have notice of a latent defect in the covering of an opening in a sidewalk, which was not made by them or under their direction. Notice to the public authorities of defects or obstructions in the streets, not occasioned by their own acts, must be express, or the defects must be so notorious as to be evident to all who have any occasion to pass the place or to observe the premises. The plaintiffs' action failed upon their own theory, and they should have been nonsuited.

There is another question presented by an appeal from an order refusing an application to strike the costs from the judgment, because no notice of the claim had been given to the comptroller of the city before suit, under section 2 of an act passed in 1859. (*Laws of 1859, p. 570.*)

It may be proper for us to say, that we are of opinion that the provisions of that act are applicable to claims for damages on account of the negligence or misconduct of the city authorities, as well as to demands upon contract, and therefore that the costs should have been stricken out of this judgment.

The judgment is reversed, and a new trial ordered; the costs to abide the event.

[KINGS GENERAL TERM, February 10, 1862. *Emott, Brown and Scrugham, Justices.*]

**HARVEY MANGAM, jun., by his guardian, vs. THE BROOK-  
LYN CITY RAIL ROAD COMPANY.**

No matter how gross or evident the negligence of the driver of a vehicle, if another, by his own negligence, exposes himself to injury from the vehicle, he has no remedy.

Knowingly to allow a child of less than four years of age to go at large in a public street, without a protector, is such negligence in his parents or guardians as will, if unexplained, prevent a recovery by him for a personal injury.

The fact that a young child, who has parents or other guardians and protectors, is found alone and unwatched in the street, is presumptive evidence that he was so exposed voluntarily or negligently by his protectors, and that their negligence thus contributed to his injury.

But the fact that the child is in the street alone, or in the way of a vehicle alone, is not conclusive that he is there by the negligence of his protectors. It is a fact which admits of explanation, and notwithstanding which the question of negligence is open to inquiry.

If the child has parents living, and he is under their charge and protection, he is responsible for their acts and omissions, as if they were his own; and for the purposes of an action by him for personal injuries, their negligence must be regarded as his negligence.

Although want of care cannot be imputed to a child, for not avoiding a passing vehicle, it may be charged upon those who have the charge of the child, if they suffer him to go, unprotected, where vehicles are passing, and where care and forethought must be required, beyond what he is capable of exercising.

The question is whether the protector exerted due care and diligence to prevent the child from going where it would necessarily be in danger; and that question should be left to the jury.

**M**OTION for a new trial, on a case and exceptions, directed by the court to be heard, in the first instance, at the general term. The action was brought to recover damages for injuries sustained by the plaintiff in consequence of being run over by a passenger car upon the defendants' road. He was three years and seven months old, at the time. The defense was that the injury was caused by the negligence of the plaintiff himself, and not by the negligence or fault of the defendants, or their agents or servants. It was proved that the plaintiff was knocked down and run over by the car, and

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one of his legs so injured that it required to be and was subsequently amputated. At the close of the plaintiff's evidence the court, on the motion of the defendants, ordered the complaint to be dismissed.

*J. M. Van Cott*, for the plaintiff. I. The injury resulted from *very gross negligence* on the part of the defendants. For all purposes of practical utility, the car, at the time of the occurrence of the injury, had no driver, and the plaintiff is entitled to have the case, as to all the points presented by it, considered as if the defendants had sent their car through the crowded streets of a city *without a driver*. (33 Barb. 503, 507.)

II. The negligence was so grossly culpable as that if it had caused injury to a passenger riding in the car gratuitously, or even under a special contract exempting the carriers from liability for accidents from negligence, the defendants would, notwithstanding those circumstances, have been responsible for the damage. (*Bissell v. N. Y. Cent. R. R. Co.*, 29 Barb. 602. *Nolton v. Western R. R. Co.*, 15 N. Y. Rep. 444.)

III. It is plain that the injury was caused by this absence of any *acting driver*, and that if there had been one, paying *even very slight* attention to his duty, it would not have happened.

IV. Where an injury to a child of tender years, unattended in a public street or highway, is caused by *gross and culpable negligence*, the wrongdoer is responsible, though the child be entirely helpless and unfit to be in the street alone. (*Hartfield v. Roper*, 21 Wend. 615; *opinion of Cowen, J.*, 619. *Lynch v. Nurdin*, 1 Ad. & Ell. N. S. [Q. B. R.] 29. *Illidge v. Goodwin*, 5 Car. & P. 190. *Bird v. Holbrook*, 4 Bing. 628.)

V. The act of sending a rail road car, unguided by a driver, through the crowded streets of a city, is one so imminently dangerous, and so grossly culpable, as that one guilty of it is *prima facie* liable for all injuries the car may cause in

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its progress, whether to an infant or an adult, a strong, alert and vigorous person, or a feeble, helpless or disabled one. If the plaintiff had been an adult, and the injury to him had occurred under the precise circumstances otherwise of the case at bar, the evidence of such circumstances would have entitled him to a verdict. At all events, had the defendants claimed exemption from liability upon the ground that the plaintiff commenced crossing the track when too near the approaching car, and was thereby guilty of negligence contributing to the injury, there could have been no nonsuit on that ground; at most, the defendants would have been entitled to a submission to the jury of the question whether the plaintiff had been guilty of negligence which did in fact contribute to the injury, accompanied by an instruction to the jury that a passenger, crossing the track of a horse rail road in the vicinity of an approaching car, has a right to assume that the car is under the guidance of a driver, and that the prudence and justifiableness of his act in crossing, is to be judged with reference to that consideration. (*Johnson v. Hud. Riv. R. R. Co.*, 6 *Smith*, 20 *N. Y. Rep.* 65. *Brown v. N. Y. Cent. R. R. Co.*, 31 *Barb.* 385. *Oldfield v. N. Y. and Harlem R. R. Co.*, 4 *Kern.* [14 *N. Y. Rep.*] 310.)

VI. There is certainly no rule of law exempting the defendants from liability for an injury to the plaintiff, caused by their gross negligence, by reason of his being a child of tender years, alone in a public street, where they would have been liable for an injury to an adult occurring under like circumstances. Such a rule would be repugnant to the clear principles of law and justice, and would shock the moral sense. If the injury had been caused by a careless discharge of fire arms, or by a ferocious dog or wild animal running at large, or by an ill built wall falling into the street, or by an unlighted trench being left open at night, or by an unrepaired bridge falling in, the wrongdoer would have been liable *irrespective of the age of the plaintiff*. Aged, infirm, deaf, even blind persons, are entitled to the use of the public streets ;

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and in crowded cities, children of a tender age are of necessity obliged to go into the streets, and are entitled to protection. The most that can be claimed adversely is, that when a loss of sight or hearing, or the feebleness of extreme age, or extreme youth, peculiarly exposes the passenger to danger, it shall be left to the jury whether it was a proximate and concurring cause of the injury. In such a case, the fault imputed to the plaintiff being in respect of his natural capacity, the onus is upon the defendant to show it to be so connected with the injurious act as to excuse it, and in that view, though a wrongdoer might be excused as to an infant plaintiff by whatever would excuse him as to an adult, he could be excused by no less. (*Lehman v. City of Brooklyn*, 29 Barb. 234. *Hartfield v. Roper*, 21 Wend. 615. *Oldfield v. N. Y. and Harlem R. R. Co.*, 4 Kernan, [14 N. Y. Rep.] 310.)

VII. The cases which hold a child of tender years who sustains an injury, while alone and unattended in a public street or highway, chargeable as for negligence in being so alone and unattended, put it upon the ground that it is the negligence of his parents or guardians in permitting him to be in such a position, and it is upon that distinct ground that he is held chargeable with the consequences of personal negligence. But in the case at bar there was no negligence of the parents or guardians. The child was kept in his father's house. Within half an hour of the occurrence he was on the rear balcony. There was no opening in the rear of the house, and there were houses on each side. The front doors, both of the basement and front hall, were locked. There was an open window in the basement about four feet above the floor, and it must have been by climbing up from the floor and getting out of this window that the child got into the street. These circumstances show that there was no negligence of the parents or natural guardians, and the sole ground on which negligence is imputed to the plaintiff in this class of cases wholly fails in this case. (*Hartfield v. Roper*, *supra*.)

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VIII. The plaintiff was not a mere helpless infant. He was nearly four years of age at the time of the occurrence. From the manner in which he got out of the house into the street, it would appear that he possessed no small amount of bodily activity. The law certainly has no absolute standard for determining the age of childhood at which one can go alone in the street without the imputation of negligence in that regard. The proper age varies very widely in different individuals, and the question of this plaintiff's age and capacity, under all the circumstances, was one of fact for the jury.

IX. Grounds of public policy do not favor the shielding of the defendants from responsibility in this case, but the reverse. The act of permitting this car to go through the streets unguided, was one so wreckless and so imminently dangerous to the public safety, that it should receive no countenance or excuse.

*G. T. Jenks*, for the defendants. I. The complaint was properly dismissed, because, conceding all the facts proved which the plaintiff claimed to exist, and that negligence of the defendants was thus shown, the plaintiff was nevertheless guilty of negligence, concurring with the defendants' negligence to produce the injury, and cannot therefore sustain this action. It was negligence of the plaintiff to be in the street of a city, at his age, unattended. The care of an infant is, and should be, confided to a person of discretion. An infant should not go into the street of a city unattended by a person of discretion. He is, therefore, in the absence of such an attendant, responsible for the exercise of all the care which such an attendant would be bound to exercise if he were present and watching over the infant. If, therefore, an adult in the place of the infant could, with the exercise of proper care, have avoided the car which caused the injury received by the plaintiff, then the plaintiff was negligent in not avoiding the car. And negligence, on undisputed facts,

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is a question of law. (*Hartfield v. Roper*, 21 *Wend.* 615. *Brown v. Maxwell*, 6 *Hill*, 592. *Kreig v. Wells*, 1 *E. D. Smith's Rep.* 74. *Underhill v. New York and Harlem R. R. Co.*, 21 *Barb.* 489.)

II. And if the plaintiff was not free from negligence, the defendants are not liable even for *gross negligence* producing the injury. The principle upon which the negligent plaintiff is not allowed to recover of the negligent defendant is, that the law will not measure the liabilities of wrongdoers, and decide how much blame belongs to one or to the other party. The law and the court cannot adjust the balance. If this be the ground of the rule, it is difficult to perceive how it can be avoided by showing a degree of negligence greater on the part of one party than on the part of the other—on the one side negligence, on the other *gross negligence*. The difficulty of adjusting the weight of responsibility still remains. And the distinction intimated by Bronson, J. in the case of *Brownell v. Flagler* (5 *Hill*, 282) excludes the negligent plaintiff from recovering against the defendant who has been guilty of gross negligence. The learned judge says, that "Where the injury of which the plaintiff complains has resulted from the negligence of both parties, without any *intentional* wrong on the part of the defendant, the action cannot be entertained." When the driver intentionally drives over a child in the street he is guilty of something worse than negligence, and the question is no longer one of negligence. But the learned judge, it is conceived, meant by the distinction to exclude all *degrees* of negligence from consideration in determining the question, when he made the defendants' liability to a negligent plaintiff depend upon a positive act—an intention—and not upon the absence of attention, which in this class of cases constitutes negligence. (*Johnson v. Hudson River R. R. Co.*, 20 *N. Y. Rep.* 65.)

III. In this case the defendants' agent was not guilty of *gross negligence*. The car was on a level grade. The horses were going at the ordinary rate. It was impossible, too, for

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the car to be swerved from its iron tracks, which conducted its motion in a direct line. And it was fair to presume that any person fit to be in the streets could, with ordinary and reasonable care, avoid such a vehicle—the rate of speed of which was observable, and the line of its progress determined and fixed.

*By the Court*, EMOTT, J. The plaintiff was run over by a car of the defendants in July, 1858, at the corner of North Tenth and First streets in Williamsburgh, and very severely injured, and this action is brought for damages for this injury. It is conceded that the defendants' driver, who had the control of the car, was guilty of negligence. He was sitting at the time upon the railing of the platform of his car, his face turned away from the horses or mules, and from the direction in which the car was going. His attention was absorbed by a bird which he had in his hands, while the reins of his animals were twisted about the brake of the car. The car was drawn by mules, and was proceeding at a steady though not a rapid pace. It is not using too strong language to say that this was gross negligence on the part of the driver of such a vehicle. It was in effect to leave the vehicle moving uncontrolled through the public streets—a vehicle which is in some respects more dangerous to other passengers on foot or in carriages than any ordinary carriage. If the danger of a collision with a rail road car is not greater, the consequences of such a collision, when it does occur, are far more serious and less easily prevented than in the case of common vehicles.

The plaintiff was coming down North Tenth street as the car was coming along First street, and in attempting to cross the track in advance of the car, he was struck by some projecting portion of the car, thrown down and run over by both wheels. At what distance from the crossing of the two streets the car was when the plaintiff set out to cross First street, does not perhaps very distinctly appear. One witness



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says, that when the plaintiff was four or five feet from the corner of the streets, the car was half a block off; and another, that he first saw the plaintiff ten or fifteen feet from the car. In an ordinary case the question would occur, in this stage of the cause, whether the plaintiff was careless of his safety in attempting to cross the street before the car should have passed: that is, whether a person of ordinary prudence, attentive to the circumstances, would have seen that it would be dangerous to attempt to cross the street before the car, or whether there was in point of fact sufficient time to have crossed, with ordinary exertions and no misadventure on the part of the passenger, and ordinary care in the driver of the car. No doubt if the car was so near when the plaintiff set out to cross the street that it was rash and hazardous to attempt to do so, then, in an ordinary case, possessing no other features, the negligence of the person injured would deprive him of any redress for his injury, notwithstanding the misconduct of the person entrusted with the car. No matter how gross or evident the negligence of the driver of a vehicle, if another by his own negligence exposes himself to injury from the vehicle, he has no remedy. If, however, no other considerations but these had entered into this case, I apprehend the learned judge who presided at the trial would not have felt himself called upon to withhold the case from the jury. The question of negligence in such actions is undoubtedly a question of law, upon an admitted or an unquestioned state of facts. But whether, in a given case, the distance between an approaching vehicle and a passenger in a street, or the circumstances of either, are such that a particular movement might be prudently undertaken, and could, and but for misconduct would, probably have been effected without collision or injury, is often a mixed question of distances, conditions, the ability of the person, and the speed and movement of the vehicle, which must be left to a jury with proper instructions.

This, however, is not the point upon which the present

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case turns. There is a fact in the case which is yet to be mentioned, that renders the questions which have now been referred to comparatively if not wholly immaterial. The plaintiff was an infant of tender years; at the time of this occurrence he was a child of less than four years of age. He was therefore necessarily incapable of exercising forethought or discretion, or of anticipating or protecting himself against the dangers to which he would be exposed in the thoroughfares of a great city. Because he was incapable of discretion, however, he was not therefore above all law. The plaintiff had parents living, and he was under their charge and protection. The law makes him responsible for their acts and omissions as if they were his own, because this is the only way in which the rule of mutual care and responsibility between persons using the highway can be enforced, in such cases. Their negligence must be regarded as his negligence, for the purposes of this action. Although want of care cannot be imputed to a child for not avoiding a passing vehicle, it may be charged upon those who have the charge of the child, if they suffer him to go, unprotected, where vehicles are passing, and where care and forethought must be required, beyond what he is capable of exercising. The rule and its reason remain the same, but its application is modified, or directed to another part of the case. I am not, however, prepared to admit the converse of the proposition to which I referred a moment ago. The defendants in such a case as this are not above all law, any more than the plaintiff, because he was of tender years and incapable personally of care and forethought. Their servant was guilty of grievous negligence, and they are liable for the consequences to the plaintiff, unless those for whose conduct the plaintiff is responsible were also guilty of negligence which contributed to the result. To allow a child of such tender years to go at large in a public street, without a protector, would unquestionably be such negligence in his parents or guardians. Such was the state of facts in *Hartfield v. Roper*, (21 Wend.

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615,) which is and deserves to be a leading case, for the very able opinion of Judge Cowen. Such was the rule approved by us in *Lehman v. The City of Brooklyn*, (29 Barb. 234.) So also the fact that a young child who has parents or other guardians and protectors, is found alone and unwatched in the street, is presumptive evidence that he was so exposed voluntarily or negligently by his protectors, and that their negligence thus contributed to his injury. But the fact that the child is in the street alone, or in the way of a vehicle alone, is not conclusive that he is there by the negligence of those for whose care the law holds him responsible. It is a fact which admits of explanation, and notwithstanding which the question of negligence is open to inquiry. A child may be in the street in the immediate charge of a competent person, and it may escape from that charge, and fall into danger and disaster. Or it may be suitably guarded and restrained from going into the street, and yet it may elude its restraints, and be in the way of danger or destruction before its protectors are aware of it. The question then is, whether these protectors exerted due care and diligence to prevent the child from going where it would necessarily be in danger. It is a similar question to that which occurs in the case of an adult, when he must prove that he neglected no precaution and exercised due forethought to avoid such dangers; except that the care and watchfulness are required at an earlier stage of the occurrence, and the inquiry goes farther back in the chain of causes which lead to the result.

My learned associate before whom this cause was tried granted a nonsuit, on the ground that the presence of such a child alone in the street, was of itself such an act of negligence, or such evidence of negligence, in his parents, that he could not recover for the injury which befell him. I agree that, unexplained, it would be so. But the question is, whether this child was in the street by the consent or through the neglect of his parents, or in spite of their precautions; and whether those precautions were sufficient to answer the

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demands of prudence and consideration. The child was at home at his father's house in First street, three doors from the corner of North Tenth street, through which latter street the rail road passes. His mother and a step-sister were in the basement hall washing, and the child was playing in the basement under their observation. The street door was closed and locked, and the child was not left alone during the afternoon, except at about twenty minutes before four, when one or both the women went into the yard to hang up clothes to dry. One of these women testifies, that at that time she saw the boy on a balcony in the rear of the house with his brother. When she returned to the room or the hall, he had probably escaped through one of the front basement windows, although she was not aware of it. In a very few minutes he was brought home, with his leg crushed by the car wheel; for another witness who saw the occurrence says that it happened before four o'clock. It is exceedingly probable that the child, after getting out of the window, ran directly down the street, and at once encountered the car at the corner. The sister of the plaintiff states that she never knew the child to go or be out alone in the street. The window through which he got out was open, and was about four feet from the floor. I think we can see, that in the circumstances of such a family as this appears to be, it would be impossible to provide a child of this age with a constant companion—one who should be every instant at hand. The support of a family is no less a duty of the parents than its protection, and for this all who can labor must be constantly occupied with their daily tasks. The law cannot exact more than nature dictates; nor can I say that the act of leaving a child of three years of age alone for a few minutes in the house while the door was closed, although a window was open, because its mother or sister were called into another part of the premises, in the discharge of their household duties, was of itself an act of negligence. Was it then a want of ordinary care to leave a window four feet from the floor open, through

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which the child might escape by climbing to it and out of it? The degree of care demanded of the parents of a child, under such circumstances, is the same which is exacted of a person of discretion in the protection of himself. It is ordinary care, the apprehension of, and the provision against, ordinary occurrences and risks. The question is, whether the person in charge of the child, leaving it in the room, or upon the balcony in the rear of the house, where it was last seen and whence it must have returned to the room, was bound to foresee that the child might or would clamber out of the window, and therefore to fasten it. To justify this nonsuit we must assume that this was so, and that a jury could not even have been permitted to find otherwise, or we must assume that the women were negligent in not pursuing the child into the street, which implies that he was there so long that they ought to have known it, and that they could have overtaken him, and thus prevented the calamity which ensued.

I am not prepared to decide these questions as matter of law, or to lay down as a rule or proposition expressly, that the parents of this child did not exercise ordinary care in watching it, and preventing its getting into the street where it would be in danger. It certainly was not in the street by their consent or permission, and although a perfect restraint, an absolute fastening of every access to the street, would of course have confined it to the house, it cannot be that ordinary care in the case of a child of this age demands so complete an imprisonment. I cannot say that these parents should be held guilty of a moral wrong in neglecting their child when he found his way out of the house, and therefore responsible, morally at least, for the painful consequences, as they must be if they were guilty of such negligence as removes the ground of this action. Such consequences were possible, but I cannot say they were probable, from what they did or what they omitted, and it is only for a neglect of probable consequences that they are responsible. The

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question of their negligence ought, at least, in my opinion, to have been left to the jury. It involves various considerations and inferences, and it is not so clear that I am prepared to decide it as a question of law against the plaintiff. I am not to be understood of course as saying, on the other hand, that I consider it the duty of the court to have decided this question expressly in favor of the plaintiff. It is sufficient that there is a question, of mingled fact and inference, and not purely of law, and therefore a question for a jury, under proper instructions.

I am of opinion that this nonsuit should be set aside and a new trial ordered; and in this opinion, upon consideration, my brethren concur.

[KINGS GENERAL TERM, February 10, 1862. *Emott, Brown and Scrugham*, Justices.]

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KING vs. POOLE.

A court possesses power and jurisdiction to determine whether it has authority to entertain a particular controversy, although its decision, and the law, be that it has no such authority, and it therefore dismisses the suit. Such a question may be presented by demurrer, and its decision must be a judgment.

Accordingly, where A. brought an action against B., in a county court, to recover damages for the wrongful detention and conversion of property, and B. demurred on the ground that the court had no jurisdiction of the subject of the action, and the county court rendered a decision sustaining the demurrer; *Held* that the court had the power to enter a judgment dismissing the complaint or suit, and awarding costs to the defendant.

Costs are a proper and necessary incident of such a judgment; and the court can no more deny them to a defendant who succeeds in establishing, upon an issue of law, that the court has not jurisdiction, than to a plaintiff who has shown that it has.

A court, when it has the parties in an action before it, must necessarily obtain jurisdiction, so far as to decide whether it can entertain the suit; that is, whether it has jurisdiction of the action. Its decision of that question is a judicial act — an exercise of jurisdiction. *Per Emott, J.*

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**A**PPEAL from a judgment of the county court of Kings county, upon a demurrer to the complaint. The decision of the court was that the defendant was "entitled to judgment on said issue, for his costs and disbursements, against the plaintiff." The judgment was in this form: "This action being at issue on the complaint of the plaintiff and the demurrer of the defendant thereto, and such issue having been duly tried by the court, and the decision thereon having been duly filed, whereby it appears that the defendant is entitled to judgment herein for costs against the plaintiff: on motion of James Wheeler, defendant's attorney, it is adjudged that the defendant, H. C. Poole, do recover of the plaintiff, John H. King, the sum of thirty-eight dollars and seventy-two cents, his costs and disbursements herein, and that he have execution therefor."

The defendant excepted to the decision, on the ground that the county court and the judge thereof had not, nor had either of them, any jurisdiction of the action, nor of the person of the plaintiff, nor of the cause of action, nor to render said decision.

*John Townshend*, for the appellant.

*James Wheeler*, for the defendant.

*By the Court*, EMOTT, J. The plaintiff brought this action against the defendant, in the county court of Kings county, to recover damages for the wrongful detention and conversion of a watch. The defendant demurred, on the ground that the court had no jurisdiction of the subject of the action. The county court rendered a decision sustaining the demurrer, and awarding judgment for costs against the plaintiff. On this decision judgment was entered by the defendant for costs, and from that judgment the plaintiff has appealed to this court.

The judgment is insufficient, or incorrect in form. It

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merely adjudges costs to the defendant, and contains no determination or disposition of the issue made by the demurrer. The judgment to which the defendant was entitled was a judgment dismissing the complaint or suit, putting an end to its prosecution, for want of jurisdiction in the court to entertain it, and leaving the plaintiff at liberty to institute a proper action for the same cause in a competent tribunal. The costs, if properly awarded, would be an incident to that adjudication.

The demurrer, however, is incorporated in the record, and the question determined sufficiently appears, I think, to prevent this judgment being a bar to a future action. The defendant did not complain of the judgment for its irregularity, or apply to correct it. He excepted to the decision for a reason which would seem to imply that the county court had no power to render any judgment, or at least no power to adjudge costs to the defendant.

Jurisdiction means the power to act judicially to determine any question presented in a controversy between parties. To enable a court to render a complete determination of a controversy, it must have the power by its constitution to hear and adjudge upon the questions involved, or to administer the relief asked, and it must have the parties properly before it; in other words, it must have or obtain jurisdiction of the parties and the subject matter. If either of these be wanting, there can be no judgment rendered upon the merits. But the consequences of a want of jurisdiction of the person and of the subject, upon the action of the court, are different, and perhaps have not been sufficiently attended to. If the court has not acquired jurisdiction of the person of the defendant, that is, if no sufficient process has been served upon him, there can be no judgment, even of abatement, given against the plaintiff, for the defendant must become a party in the court before he can have a judgment. If he pleads a personal privilege, or the like, his attitude is different. But where the court has acquired jurisdiction of the person of the



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defendant, but has no jurisdiction of the subject of the controversy, the case is otherwise. There the parties are rightfully before it, and when the question is raised whether it has jurisdiction to determine the controversy between them, that question itself is one which calls for a judicial determination. A court, where it has the parties in a cause before it, must necessarily obtain jurisdiction, so far as to decide whether it can entertain the suit or proceeding ; that is, whether it has jurisdiction of the action. Its decision of that question, whether it be made in the form of an order or a judgment, is a judicial act—the determination of a question between the parties—and is necessarily and by the very force of terms an exercise of jurisdiction. Whether such a decision should be given by way of order or judgment, and what incidents attach to the decision in either form, are merely matters of practice, to be regulated by statutes or the rules governing particular courts. This is the view taken of such a question by the supreme court of Massachusetts in *Hunt v. Inhabitants of Hanover*, (8 Metc. 343,) and it is the only rational view. There is an observation of Ch. J. Kent, in the *Matter of Ferguson*, (9 John. 239,) that if a court has no jurisdiction of the principal question, it has none of its consequences and incidents, which is sometimes quoted, apparently, to show that when a court has not rightfully complete jurisdiction of a cause, both of the subject and the parties, it can do nothing in it. It is plain, upon a little attention, however, that the principle stated has no bearing upon such a question. The observation was made by Ch. J. Kent to sustain the view that the courts and judicial officers of a state could not issue a writ of habeas corpus in the case of a person illegally imprisoned by an officer of the United States, because it was held that the state courts could not entertain an indictment against the officer for the illegal imprisonment. The conclusion was not adopted by the court, and has not been recognized by succeeding authorities. But as to the applicability of the remark to cases like the present, it must first be ascer-

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tained what is the principal question and what its incidents. A question of jurisdiction is not an incident of the questions upon the merits in the cause ; it is in itself a principal question, and it may be the principal question in the case. It is true that the award of costs, or the like, are incidents of the principal question or issue between the parties, and if the court has no power to decide that question, it has no power to make the incidental award of costs upon it. A court always has jurisdiction of the person of a plaintiff who institutes a suit in its forum, and if the defendant is properly brought in, although he denies the jurisdiction over the subject, yet he also is in court. Thus the jurisdiction exists over the parties, and the necessary power to determine the very question of jurisdiction itself enables the tribunal to render a determination of that question, which will be valid and binding.

The mode of taking an objection to the jurisdiction, or of presenting the question to the court, may be and has been different under different systems of practice. Before the code of procedure was adopted, the defendant could plead to the jurisdiction, sometimes in abatement and sometimes in bar. The plaintiff either replied or demurred, and the issue thus formed resulted in a judgment. In most cases, also, the want of jurisdiction might be taken advantage of under the general issue, at the trial. If the plaintiff failed to aver and prove a case within the jurisdiction of the court, in respect to the subject and the place where the cause of action arose, he would be nonsuited, as for any other failure of proof, and upon that a judgment would be entered. There were and there still are cases in which the question of jurisdiction is raised by a motion, and there is a class of cases relating to jurisdiction in appellate tribunals in which the forms of procedure were different. Some of these latter cases will be noticed presently.

The code, § 144, authorizes a defendant to demur to the complaint, when it shall appear upon the face thereof that

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the court has no jurisdiction of the person of the defendants, or of the subject of the action. Section 147 provides that when these facts do not appear on the face of the complaint, the objection may be taken by answer ; and section 148, that the objection to the jurisdiction is not waived, but may be interposed at any proper opportunity, although not raised by either answer or demurrer. When, however, as in this case, the objection is taken by demurrer, an issue of law is formed, upon the right of the plaintiff to prosecute his suit. The decision of that issue results in a judgment, which is a final determination of that right, and the court can no more refuse to render that judgment, than it can a judgment upon any other demurrer. Thus, upon principle, a court possesses power and jurisdiction to determine whether it has authority to entertain a particular controversy, although its decision and the law be that it has no such authority, and it therefore dismisses the suit ; and according to the present practice such a question may be presented by a demurrer, and its decision must be a judgment. The county court was perfectly right, therefore, in giving a judgment upon this demurrer, and thus determining that the suit must be dismissed, because it could not be entertained by that tribunal.

It is equally plain that costs are a proper and necessary incident of such a judgment. Costs are in all cases the creation of statute, and are given or withheld as the statutes direct. Of course, if the court has no jurisdiction to render a judgment, no costs can be awarded, but where this principal power exists, the incident of costs depends upon the positive regulations of the statute. The present code of procedure gives costs to the prevailing party, in the judgment rendered upon an issue of law, such as that formed by this demurrer, and the court could no more deny that right to a defendant who had succeeded in establishing that the court had not jurisdiction, than to a plaintiff who had shown that it had.

There has been no case produced by counsel, nor do I find

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any, which is in conflict with these views. *Harriott v. The New Jersey R. R. Co.*, (8 *Ab. R.* 284,) was a case in the New York common pleas, where the defect in jurisdiction was in the persons of the parties. The point was not taken until the trial, when an order was entered dismissing the complaint. From this order an appeal was taken, leaving the trial interrupted and without any result. The order was affirmed, and then the defendant went back and entered a judgment for costs, which was set aside, on motion. I confess I do not see why if the defendant had simply applied for a nonsuit it must not have been granted, and upon it a judgment dismissing the complaint with costs. The learned judge who set aside the judgment seems in some parts of his opinion to argue that as the court had no jurisdiction of the subject of the action, it could render no judgment whatever; but at another place he expressly states, that if the objection to the jurisdiction had been taken by demurrer, the prevailing party would have had a judgment in his favor, and costs awarded him. The case of *McMahon v. Mutual Benefit Life Insurance Co.* (*Id.* 297) contains two well reasoned opinions by Judges Bosworth and Woodruff of the superior court, to the effect that where a suit is dismissed for want of jurisdiction, the defendant must have judgment for costs. It does not appear in that case how the objection was taken, except that it was not upon the pleadings. I infer that it was raised at the trial. The case of *Gormly v. McIntosh* (22 *Barb.* 271) was a case where a judgment had been rendered in the county court, an appeal was taken to this court, and the judgment was reversed on the ground that the county court had no jurisdiction of the cause. The court held that the defendant was entitled to costs of this appeal, but not of the county court. The stress of the opinion is to show that the right to costs in this court attaches to the appeal as a distinct proceeding. It does not appear that any objection was taken to the jurisdiction, in the county court, or that that court passed upon that question distinctly. The case is therefore not an authority

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upon the present question. Mr. Justice SMITH, in the elaborate opinion delivered by him in this case, refers to a remark of Judge Cowen in *Malone v Clark*, (2 Hill, 658,) that if the court below had no jurisdiction of the subject matter, their course was not to render any judgment at all. It will be seen upon an examination of this case that it was a writ of error to the Lewis county court of common pleas, who had rendered a judgment of discontinuance against a plaintiff, on the trial of an appeal from a justice, a proceeding which as the law then stood removed the whole case into the common pleas for a jury trial upon the merits. The objection taken was that the justice had not obtained jurisdiction of the defendant's person, and the judgment was reversed because the appearance of the defendants waived the objection, and because the question could only have been brought before the common pleas on certiorari, and not on appeal. What was said by the learned judge, as to the power and duty of a court when it discovered its want of jurisdiction, and especially in reference to a want of jurisdiction of the subject of the action, was altogether obiter dictum, and must receive some explanation before it can be universally admitted. The case of *Striker v. Mott* (6 Wend. 465) turned upon the provisions of the statute in reference to a plea of title in a trespass suit before a justice of the peace. The cases of *Ex parte Benson*, and *Ex parte Mallard*, (6 Cowen, 593,) were both questions as to an appellate jurisdiction, and besides, presented only questions of the exercise of discretion. The case of *The People ex rel. Mallard v. Judges of Madison Co.* (7 Cowen, 423) is the same matter just cited, as reported in another stage of the proceedings, in 6 Cowen, 593. The authority of the case of course goes no farther than has just been stated, and the remarks of the court are to be applied to the facts before them, and understood of appellate proceedings.

It will be impossible to find any sufficient sanction for the doctrine that a court either of general or limited jurisdiction

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 Miller v. Collyer.
 

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has not the power to decide, either by order or judgment, the question of its own jurisdiction, or its right to proceed between parties before it.

It is likewise entirely clear that the question of jurisdiction was duly raised in this case by a demurrer in the county court, and properly decided by a judgment, in effect sustaining the demurrer, to which the costs of the action were an incident.

The judgment must be affirmed with costs.

[KINGS GENERAL TERM, February 10, 1862. *Emott, Brown and Scrugham*, Justices.]

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 MILLER vs. COLLYER.

The remedy against a purchaser who refuses to complete a purchase under a decree or judgment of a court of equity, is by an application to the court to compel him to complete it, or to resell the property, and hold him liable for the loss and the additional expenses.

A paper signed by an individual, on becoming a purchaser of property at a sheriff's sale under a judgment, by which he agrees to comply with the conditions of sale, is not a contract, either with the sheriff or the plaintiff in the foreclosure suit, upon which an action can be maintained by the latter as the assignee of the sheriff.

Such an instrument, in the form of a memorandum at the foot of the conditions of sale, signed by the purchaser, is merely a submission by him to the jurisdiction of the court, in the foreclosure suit, as a purchaser under the judgment therein. It lacks some of the essential elements of a contract; such as parties, mutuality and consideration.

*It seems* that conditions of a sale by a sheriff on execution, imposing upon the purchaser a liability to pay the amount of any deficiency in case of a resale, will not apply to any case except that of a resale made forthwith, upon failure of the purchaser to pay the required per centage of his purchase.

**A**PPEAL from a judgment entered upon the report of a referee. The nature of the action, together with the facts as found by the referee, are fully stated in the opinion of the court. The referee reported that there was nothing

36 250  
64h 409

36 250  
60h 72

36b 250  
21ap610

36b 250  
155a 417

36b 250  
59ad287

36b 250  
167a 559

36b 250  
84 AD<sup>2</sup>403

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due from the defendant to the plaintiff; and judgment was entered upon the report, in favor of the defendant, for his costs. The plaintiff appealed.

*W. Emerson*, for the appellant.

*F. Larkin*, for the respondent.

*By the Court*, EMOTT, J. The agreement upon which this action was brought, was a paper signed by the defendant in becoming a purchaser at a sale by the sheriff of Westchester county, under a judgment of this court in an action for the foreclosure of a mortgage. It was a memorandum at the foot of the conditions of the sale made by the sheriff, stating that the defendant had purchased at a certain price, and that he agreed to comply with the conditions. These conditions provided that twenty per cent of the purchase money should be paid at the time of the sale, which was on the 26th of February, 1856, when the deed was to be ready for delivery. The fifth clause in the terms of sale reads as follows: "The biddings will be kept open after the property is struck down; and in case any purchaser shall fail to comply with any of the above conditions of sale, the premises so struck down to him will be again put up for sale under the same terms of sale, without notice to the purchaser; and such purchaser shall be held liable for any deficiency there may be between the sum for which the said premises shall be struck down upon the sale, and that for which they may be purchased on the resale, and also for any costs or expenses occurring on the resale." The premises were struck down to the defendant for \$2811. He did not pay the twenty per cent at the time of the sale, nor afterwards. He did not appear to claim his deed on the 26th of February, and no deed was ready for him at that time. No sufficient deed was ever executed, but an unsealed paper was at length tendered to the defendant, which he refused to receive, or to complete his purchase. At

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length, in June, 1857, the premises were again advertised, and on the 21st day of August, 1857, were sold by the same sheriff, then out of office, and again purchased by the defendant, for \$2300. A new set of conditions of sale were made at this resale, varying from the former in this respect, that twenty per cent being paid at the time of the sale, which was August 21st, the residue was payable and the deed to be delivered September 28th, and also in other particulars which are perhaps not important. This action is brought by the plaintiff in the foreclosure suit to recover the difference between \$2811 and \$2300 and the expenses of the resale.

The execution of the judgment, throughout, was very loosely conducted by the sheriff. Such conduct in a master in chancery would no doubt have provoked the severe animadversion of the court; but under the present condition of things such practice seems to be, in the sheriffs' offices in some counties, the rule rather than the exception. It was the duty of this sheriff to have insisted upon the payment of the twenty per cent at the time of the first sale, to have kept the biddings open until it was paid, and to have provided distinctly for the forfeiture of that sum if the purchaser did not afterwards complete his purchase. That is the object of requiring a deposit or payment in the case of judicial as well as other sales, and this object is liable to be wholly defeated by not requiring the payment before closing the sale. It was equally the duty of the sheriff, when the defendant did not comply with his terms at the time of the sale, to proceed at once to sell again, and not to leave the matter open for more than a year and a half.

It is indeed to my mind more than doubtful whether the condition of the sale in 1855, imposing liabilities upon a purchaser in case of a resale, would apply to any case except a resale made forthwith, and of course upon failure to pay the required per centage of his purchase. The conditions provide that the biddings are to be kept open, and if the purchaser fails to comply, the premises are to be again put



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up under the same terms of sale. There is no reference to any disposition of the per centage required on the day of sale, nor do the conditions provide either for its forfeiture or return.

However this may be, this action cannot be supported. The remedy against a purchaser who refuses to complete a purchase under a decree or judgment of a court of equity, is by an application to the court to compel him to complete it, or to resell the property and hold him liable for the loss and the additional expenses. Such an application will be disposed of upon equitable principles, and no doubt facts would be considered which could not be allowed to influence the decision of a suit at law. There was at first some hesitation as to the power of the court of chancery in such cases. In *Lansdown v. Elderton*, (14 Ves. 512,) Lord Eldon doubted whether he had the power to commit a purchaser, or do more than discharge him from his purchase, but at length made the order, observing that a purchaser could not be allowed to baffle the court. In *Gray v. Gray*, which, although decided in 1811, will be found first reported in 1 Beav. 199, an order was made against a purchaser that he pay his purchase money within a time set, or in case of default that the property be resold, and the purchaser pay the deficiency, if any, from the price of his purchase, and the price at the resale, with the costs. This case is approved in *Harding v. Harding*, (4 Myl. & Cr. 514,) in which there had been an order discharging the purchaser from his purchase, but at the same time ordering a resale, and holding him for the deficiency. On appeal, Lord Lyndhurst decided that the proper course was not to rescind the sale, and leave the question to an action for damages, but to hold the purchaser to his purchase, and order a resale in the meantime, and that the purchaser pay the loss and expense, enforcing the order by process of contempt. These cases do not proceed strictly upon the ground of contract, but upon the ground that when a person be-

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comes a purchaser under a decree, he submits himself to the jurisdiction of the court as to all matters connected with the sale or with him in the character of purchaser. (*Requea v. Rea*, 2 *Paige*, 339.) He may as well be compelled to complete as to relinquish his purchase, and the court by whose order the sale is made must decide in the original suit, whether either is equitable and right. The existence of this jurisdiction in the original action is a sufficient reason why a court of law should not entertain a new action on the alleged contract as between party and party. In *Wood v. Mann*, (3 *Sumn.* 318, 325,) Judge Story expressed a decided opinion that a court of law would not entertain jurisdiction of an action upon a covenant under seal by a purchaser under a decree, and a surety, made expressly to and with the party for whose benefit the lands were sold, that the purchaser would comply with the terms; which would be a different and a much stronger case for an action than this.

The present action is not a suit for damages for the breach of a contract to purchase. It is an action to recover an amount stipulated to be paid by the defendant, in the paper signed by him on the 26th of December, 1855. The plaintiff has taken an assignment of this paper, and contends that it is a contract between the defendant and himself as the real party in interest. His counsel admits that the sheriff could have maintained no action upon this paper, and substantially concedes that nothing passed by his assignment to the plaintiff. The cases cited, *Yates v. Joyce*, (11 *John.* 136,) and *Barker v. Matthews*, (1 *Denio*, 335,) certainly contain the doctrine, that a sheriff has no right or interest in real estate advertised to be sold by him, which will authorize him to maintain any action for an injury or an interference with it. These cases do not, however, maintain the plaintiff's position. They were both actions on the case for damages, and in the case in 11 *John. Rep.* a man who had a legal lien on certain lands by a judgment was allowed to maintain

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an action for a fraudulent injury to the lands by the removal of buildings and fences, with intent to defeat or prejudice such lien; while in *Barker v. Matthews*, such an action was not sustained for a similar injury to personal property which had been levied upon, because the property was in the custody of the officer, and he could have sued the wrongdoer.

The paper signed by the defendant is no more a contract with the plaintiff than with the sheriff. The plaintiff is not a party to it, and has neither powers nor duties under it. It is not a mutual agreement between the defendant and the plaintiff, or any other party to the foreclosure. If it is to be called a contract at all, it is a contract with the court. The sale is made by the order of the court, and is under its control, and not that of any party, to perform or to rescind. In truth, however, the word contract is somewhat inartificially used when it is applied, as it has been by judges, to such papers. The memorandum signed by the defendant was only a quasi contract; it was in reality a submission to the jurisdiction of the court in the foreclosure suit as a purchaser under the judgment. It is easy to see that it lacked essential elements of a contract, not only parties, but mutuality and consideration. It contained, or was intended to contain, an express consent to the exercise of the powers which we have seen courts of equity assert *ex proprio vigore* over purchasers; and it is doubtful if it added any thing to the jurisdiction or authority of the court, in this particular. There can certainly be no suit maintained upon it as an express stipulation with any person whatever.

The foregoing considerations are conclusive against this suit. This is not, it must be observed, a special action for damages. The complaint contains no sufficient averments for that purpose, nor would the proofs sustain them. The summons is for a money demand, and the suit is wholly in contract.

It is unnecessary to proceed farther with an examination

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of the controversy, although, if the court could entertain the action, I think it would not be difficult to show several sufficient reasons why the plaintiff ought not to recover.

The judgment must be affirmed with costs.

[KINGS GENERAL TERM, February 10, 1862. *Emott, Brown and Scrugham*, Justices.]

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GALWEY vs. THE UNITED STATES STEAM SUGAR REFINING COMPANY.

The statutes provide for but three cases in which a receiver of the property of corporations (other than moneyed corporations) can be appointed : 1. Upon the application of a creditor by judgment or decree, on the return of an execution unsatisfied. 2. When the corporation has been insolvent for a year, or has neglected or refused, for a year, the payment of its debts, or has suspended its business for a year. 3. Upon the application of the directors or trustees, when in their judgment the condition of the corporation makes a voluntary dissolution desirable.

A receiver of a manufacturing corporation will not be appointed, in an action brought against it by a creditor at large who seeks for a dissolution of the corporation and the distribution of its effects, on the ground of its insolvency, and that its trustees, instead of taking proceedings for the dissolution of the company, intend to facilitate the recovery of judgments against it, by certain creditors, with a view to give them a preference, and thus to effect alienations of the property contrary to law. MULLIN J. dissented.

**A**PPEAL from an order made at a special term, denying a motion for a receiver. The action was brought by the plaintiffs, who were creditors at large of the United States Steam Sugar Refining Company, to procure a dissolution of the corporation and the appointment of a receiver, on these grounds : 1. Because the company was insolvent, and its property, consisting mostly of real estate, was not worth more than fifty per cent of its unsecured debts ; and 2. Because its trustees (who were made defendants) ought to take proceedings for the dissolution of the corporation, and the equal distribution of its property among its creditors ; but

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that instead of doing so, they intended to facilitate the recovery of judgments against the company to an amount exceeding half the value of its assets, and thus, by priority of lien, to give preferences, and by suffering the judgments to be executed, to effect alienations of the property of the corporation contrary to law. The defendants put in affidavits in which they denied most of the material allegations of the complaint. The corporation was formed under the general law of April 17, 1848, authorizing the formation of corporations for manufacturing, mining, mechanical or chemical purposes. (*Laws of 1848, p. 54*) A temporary injunction which had been obtained, against the corporation and its trustees or directors, was ordered to be continued.

*H. P. Fessenden and C. O'Connor, for the appellants.*

*W. M. Evarts, for the defendants.*

BARNARD, J. The statutes provide for but three cases in which a receiver of property of corporations (other than moneyed corporations) can be appointed: 1st. Upon the application of a creditor by judgment or decree, on the return of an execution unsatisfied. (2 *R. S.* 463, § 36.) 2d. When a corporation has been insolvent for a year, or has neglected or refused for a year the payment of its debts, or has suspended its business for a year. (*Id.* § [38] 46.) 3d. Upon the application of the directors or trustees when, in their judgment, the condition of the corporation makes a voluntary dissolution desirable. (*Id.* 467, § 58.)

The case made by the complaint clearly does not fall within any one of the above provisions. The case made by the complaint falls within § 43, and particularly subdivisions 3, 4, 6, 7 and 8 of that section. This section (43) does not authorize the appointment of a receiver, nor is there to be found any other section which authorizes a receiver of the property

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of the corporation to be appointed in any action or proceeding brought for any of the causes mentioned in section 43.

It is obvious that the appointment of a receiver of the property of the corporation is not necessary for the protection of the rights of the parties plaintiff or applicant, under section 43. In all those cases the proceeding is not against the corporation as a corporate body, but against its officers; and none of the matters mentioned in that section are cause for the dissolution of the corporation. It is difficult to see how, under such circumstances, the property of a corporation can be vested in a receiver. We do not mean to be understood as holding that under the general equity power of the court a receiver may not be appointed of property which a director, or trustee, or a third party, proceeded against under section 43, may have in his possession and hold *in invitum* against the corporation to protect it against waste, loss or destruction *pendente lite*, and to deliver it to the corporation in the event of its being decided to belong to the corporation. This, however, is far different from taking the property held by the corporation and transferring its possession to a receiver, to be held for the benefit of creditors, when no cause for the dissolution of the corporation exists. It is evident that the statute does not authorize a receiver of the property held by corporations in the cases specified in section 43, since, from the very nature of such proceedings and the causes for which they are allowed, such a receivership would be improper. Under the case as made by the complaint, the motion for a receiver was properly denied, and the order should be affirmed with \$10 costs.

CLERKE, J. concurred.

MULLIN, J. (dissenting.) Before proceeding to examine the legal questions arising on this appeal, it is necessary to dispose of the question of fact presented by the papers; and that is, was the corporation insolvent when the motion for

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the appointment of a receiver was made? Insolvency is charged. The charge is met by a qualified denial. The property of the corporation is shown to have cost a much larger sum than the entire indebtedness, and that it is now intrinsically worth a great deal more; but it is conceded that if sold in the present depressed condition of affairs, it would not bring enough to pay the debts.

If the depreciation of property was the result of causes which we could see would disappear in a short time, we might with great propriety hold that the solvency or insolvency of a person or corporation should be made to depend upon the value of his or its property, at such a time. But the depreciation has, as is shown by the papers, been existing for more than a year, and we cannot now say that another year will bring with it any improvement. Under these circumstances, it seems to me we must hold that the value of the property of this corporation must be estimated, for the purposes of this question, at its present prices, and so estimating it the corporation is insolvent.

A court of equity, as such, has no visitorial power over corporations. (*Attorney General v. Utica Ins. Co.*, 2 John. Ch. R. 370. *Same v. Bank of Niagara*, Hopk. 354.) By the 3 R. S. 5th ed. 761, § 39, the court of chancery was clothed with power over corporations for certain specific purposes, and which purposes were to be attained in the manner prescribed in the act. These powers were, 1st. To restrain by injunction any corporation from exercising powers or franchises not authorized by their charter; and to restrain individuals from exercising corporate powers not granted by some law of the state. Proceedings for these purposes can be instituted by the attorney general. 2d. Jurisdiction was given over directors, managers and other trustees and officers, in eight cases enumerated in the 41st section of the statute referred to. The 7th is to set aside all alienations of property made by the trustees or other officers contrary to the provisions of law; and the 8th is to restrain and prevent any such

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alienation in cases where it may be threatened, or there may be good reason to apprehend it may be made. Proceedings under this section may be instituted by the attorney general, or at the instance of any creditor or of any officer of the corporation having a general superintendence of its concerns. (§ 43.) 3d. When a judgment at law or decree in equity is rendered against a corporation, and an execution has been issued thereon and returned unsatisfied in whole or in part, the court, upon the petition of the person obtaining such judgment or decree, or his representatives, may sequester the stock, property, &c. of the corporation and appoint a receiver. 4th. When any incorporated company shall have remained insolvent for one whole year, or for one year shall have neglected or refused to pay and discharge its notes or other evidences of debt, or for one whole year shall have suspended its ordinary and lawful business, it shall be deemed to have surrendered the rights, privileges, franchises, &c., and shall be adjudged to be dissolved. When the object is to dissolve the corporation, without regard to any remedy against or sequestration of its property, proceedings must be instituted by the attorney general.

It was held by the chancellor, in *Innes v. Lansing*, (7 Paige, 583,) that where the directors of a corporation do any act which works a forfeiture of its charter, it is such a violation of the law incorporating the company as to authorize a *creditor* or a stockholder to institute proceedings against it, for the purpose of having a receiver appointed to close up its concerns, under the provisions of the revised statutes relative to proceedings against corporations in equity. (12 Barb. 27.) 5th. Whenever the officers having the management of the concerns of any corporation, or a majority of them, shall discover that the stock, property and effects of such corporation have been so far reduced, by losses or otherwise, that it will not be able to pay all just demands to which it may be liable, or to afford a reasonable security to those who may deal with it, or whenever such officers shall, for any reason, deem it



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beneficial to the interests of the stockholders that such corporation should be dissolved, they may apply by petition for a decree dissolving such corporation pursuant to the provisions of the statute. (3 *R. S.* 768, § 69.) Proceedings under this section can only be instituted by the officers of the corporation. 6th. It is provided by 2 *R. S.* 5th ed. 601, § 4, that whenever any incorporated company shall have refused the payment of any of its notes or other evidences of debt in specie or lawful money of the United States, it shall not be lawful for such company or any of its officers to assign or transfer any of its property &c. to any stockholder of such company, directly or indirectly, for the payment of any debt, nor to make any assignment or transfer in contemplation of insolvency of such company, to any person whatever; and every such assignment, if made, is utterly void. And when any such company shall have remained insolvent a year, or for a year neglected to redeem its notes, &c., or for a year suspended its ordinary business, it shall be deemed and adjudged to have surrendered the rights &c. granted by its act of incorporation, and shall be deemed dissolved.

Under the first branch of the aforesaid section, a stockholder, creditor or other person entitled to protection, may proceed to restrain the company from assigning, &c.; and under the last branch it would seem that the attorney general only could proceed, unless in the cases in which the officers of the company, under a provision hereinbefore cited, may proceed to dissolve the corporation.

It follows from these provisions of the statute, in none of the cases prescribed have creditors the right to institute proceedings to dissolve the corporation by reason of insolvency, actual or contemplated, except when they have recovered judgments, and had executions issued thereon returned unsatisfied in whole or in part.

They may apply for injunctions to prevent assignments made or threatened with a view to giving preferences, and when the corporation has omitted to redeem its notes or pay

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its debts for a year, or suspended for the same time its operations, or remained insolvent for a year, they may apply for a receiver of the property and effects of the corporation. In this case the plaintiffs, as creditors, have the benefit of an injunction to restrain alienations. They are not judgment creditors so as to proceed under provisions of the statute applicable to them, and a year had not elapsed when this suit was instituted and motion made so that they could demand relief under the provisions of the statute which renders insolvency or non-payment of debts a ground for the appointment of a receiver. It seems to me, then, that under none of the statutes authorizing proceedings against corporations can the plaintiff obtain the relief sought by this motion.

It is quite obvious that it is the intention of the legislature to secure to the creditors of an insolvent corporation equality in the payment of their debts out of its property and effects. Hence it is that creditors have the right to enjoin the officers from giving preferences or making assignments or transfers for that purpose or with that intent. It is further provided by 3 *R. S.* 767, § 65, that whenever any action shall be commenced or any application made against any corporation or its officers or stockholders, according to the provisions of the title relating to proceedings against corporations in equity, the court may, by injunction, on the application of either party, restrain all proceedings at law by any creditor against the defendants in such suit. And the courts are required to cause all the creditors of the corporation to be brought in, and if the creditors do not appear, they are to be precluded from any share of the assets.

Although it is the intention of the legislature to secure equality amongst creditors, it secures it in but one way, and that is by injunction against giving preferences and preventing the creditor from obtaining a preference by action.

The statute seems to contemplate the appointment of a receiver only in case of the dissolution of the corporation. If

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the plaintiff is entitled to a receiver, it must be on some ground other than the statutory provisions above referred to.

The chancellor, in *Innes v. Lansing*, (7 Paige, 583,) held that a creditor at large of an insolvent limited partnership may file a bill in behalf of himself and all other creditors of the copartnership, to restrain the insolvent partners from disposing of the property and effects of the firm contrary to law, and for a receiver, and to have the copartnership proceeds distributed among all the creditors ratably, according to the statute. It will be seen that the provisions of the revised statutes, (3 R. S. 64, §§ 20, 21,) relating to assignments, transfers and creation of liens with a view to a preference amongst creditors by insolvent limited partnerships, are substantially like the provisions on the same subjects in relation to insolvent corporations. The chancellor (p. 586) says, "it is evident from these statutory provisions that the legislature could not have intended that a creditor of such insolvent limited partnership should be compelled to proceed to judgment and execution at law, the necessary effect of which might be to give him a preference over other creditors, before he could be permitted to file a bill in this court to prevent the partnership funds from being wasted by the insolvent partners, and to obtain payment of a ratable portion of his debt out of the fund. Although any creditor, therefore, may proceed at law for the recovery of his debt, unless a decree has been obtained in this court for the benefit of all the creditors equally, or the property has been transferred to a trustee or receiver for the purpose of having such a ratable distribution thereof, I think this court is bound to carry into effect the principle of the statute by treating the property of the limited partnership, after insolvency, as a trust fund for the benefit of creditors \* \* \*. Whenever the legislature creates new rights in parties, for the protection and enforcement of which rights the common law affords no effectual remedy, and the statute itself does not prescribe the mode in which such rights are to be protected, this court, in the exercise of its acknowledged

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jurisdiction, is bound to give to a party the relief to which he is equitably entitled under the statute."

The creditors then, of a limited partnership, are by statute entitled to have their debts paid ratably out of the property of the partnership. So are the creditors of a corporation. This object may be secured by the members of the partnership by a transfer of the property to a trustee, to be ratably distributed. The officers of a corporation may apply for a dissolution and a consequent ratable distribution.

The creditor of the limited partnership may apply to the court to restrain alienations or the giving of liens in order to give preferences. So may the creditors of a corporation. A judgment creditor of a limited partnership, whose execution has been returned unsatisfied, may proceed and enforce payment of his debt. But the creditor by judgment, of a corporation, whose execution has been returned, cannot obtain a preference, but must proceed and dissolve the corporation, and thereby secure to all the creditors a ratable share of the property. The chancellor says it is because the *right* to a ratable share of an insolvent limited partnership is given by statute, without any means being given by the statute to enforce it, that he afforded relief in *Innes v. Lansing*; and it seems to me that relief must be granted in this case for precisely the same reason.

There is no mode pointed out by the statute by which the creditor at large of an insolvent corporation can secure under the statute his right to a ratable portion of its property. The officers may secure it if they will. So may the partners of an insolvent partnership. It is optional with both; the creditor has no means to compel them to act; and unless relief is given by the courts the creditor is helpless, and the right to a *pro rata* share declared by the statute is a mere illusion.

The defendants' counsel says that this case is distinguishable from *Innes v. Lansing* in this, that the statute has prescribed a mode, in the language of the chancellor, in which

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the rights are to be protected in the case of creditors of insolvent corporations ; whereas there are none in the case of an insolvent limited partnership. I am wholly unable to discover the difference. The cases were parallel, as to all the provisions touching the rights of creditors to secure their ratable shares of the property of the insolvent debtors.

There is no method prescribed by the statute by which a creditor at large of a corporation can secure the right to a ratable share of its property in case of insolvency.

It was not enough to deprive the party of relief, in the case of *Innes v. Lansing*, that the giving of preferences and creation of liens were forbidden and declared void. Nor is it enough in this case that an injunction may issue to restrain the doing of the forbidden acts. In stopping them, the party is only in part relieved. Unless the property passes into the hands of a receiver, it may, by delay, be lost or so depreciated as to be practically valueless.

On this ground, and for these reasons, I think the plaintiff was entitled to a receiver, and that the part of the order appealed from which refuses a receiver should be reversed, with \$10 costs.

Order affirmed.

[NEW YORK GENERAL TERM, November 4, 1861. *Clerke, Mullin and Barnard*, Justices.]

36 266|  
73h 427|  
36 266|  
85h 173|

THE BOARD OF COMMISSIONERS OF EXCISE FOR THE CITY  
AND COUNTY OF NEW YORK *vs.* PURDY.

Where the facts submitted warrant it, the court may, by virtue of the general power which courts exercise over their officers, order the plaintiff's attorney to show his authority to bring the suit.

But the court will not exercise the power, so far as to dismiss the suit, in an action brought by commissioners of excise, for a penalty, under the act to suppress intemperance, &c. in behalf of a defendant whose only ground of making the motion is that no complaint was made to the excise commissioners before the commencement of the action, that the defendant had violated the statute, and that the commissioners have not authorized the bringing of the suit. LEONARD, J. dissented.

The only order the court will grant, in such a case, is an order to *stay the proceedings*, until further order.

And *it seems* that on showing to the court a state of facts that would prevent his collecting them of the plaintiffs, the defendant may ask for security for costs.

**A**PPEAL from an order made at a special term, dismissing the complaint, with costs to be paid by the plaintiff's attorney, on the ground that the action had been brought without authority. The action was brought to recover a penalty of \$50, for an alleged violation of the "Act to suppress intemperance, and to regulate the sale of intoxicating liquors," passed April 16, 1857, (*Laws of 1857, vol. 2, ch. 628,*) in selling spirituous liquors or wines, in quantities less than five gallons, without a license. The application to dismiss was made by the defendant, on an affidavit stating that no complaint had been made to the excise commissioners, before the commencement of this suit, that the defendant had violated the statute, and showing that the commissioners had not authorized the bringing of the same.

*Sickles & Cushing*, for the appellants.

*James M. Smith*, for the respondent.

INGRAHAM, P. J. The motion in this case was to dismiss the complaint and direct the attorneys to pay the costs. The

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Commissioners of Excise of New York v. Purdy.

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plaintiff's attorneys, if they had any authority to bring the actions, could have shown it on the motion, and there was no necessity for an alternative order that they should produce such authority or the actions should be dismissed.

The difficulty with me on this appeal is as to the right of the defendant to make the motion. In *Thayer v. Lewis and others* (4 Denio, 269) a motion similar in all respects was made, and denied upon the express ground that the defendants could not object that the suit was prosecuted by a third person, in the name of the overseers of the poor, without their consent. That the overseers alone had the right to complain that their names had been improperly used. And in the same case it was held that the overseers alone could object that they had not neglected to prosecute for ten days, before their names could be used by a third person. Bronson, Ch. J. says: "We think the defendant has nothing to do with the matter."

So far as the liability for costs would exist, the plaintiffs are alone interested. If, after notice to them of bringing such actions, they refuse to take measures to stop them, they will be liable for costs. In the cases of *The Ninety-nine Plaintiffs v. Vanderbilt*, (1 Abb. 193,) the court required the attorney to exhibit his authority. That case was in conflict with the case in 4 Denio, but the court say the defendant cannot insist upon the exercise of the power by the court to compel the production of the attorney's authority, but must ask for the exercise of the discretion of the court, and submit to the terms which the court may impose. The question whether the defendant could make the motion, was not discussed. In most, if not all the cases cited, the motion was made by the plaintiff to stop the use of his name as plaintiff. This power is not doubted; nor do I doubt that the court has authority, if the facts submitted warrant it, to call on the plaintiff's attorney to show his authority, by virtue of the general power which the court exercises over its officers; but I do doubt whether the court should exercise such

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a power in behalf of a defendant whose only ground of making the motion is, that no complaint has been made to the board of commissioners of excise, previous to bringing the action. If any injustice was to be done to the defendant by the prosecution, if any rights were to be violated, if any property was to be unjustly taken from him by such act of the attorney, the court should interfere, but not otherwise. At any rate, under the decisions, no other order should be made than to *stay the proceedings* until the further order of the court. And the defendant might perhaps ask for security for costs, on showing to the court a state of facts that would prevent his collecting them of the plaintiff.

CLERKE, J. concurred.

LEONARD, J. (dissenting.) A further examination induces me to adhere to the views expressed in my opinion when this motion was before me at special term, now reported in 22 *How. Pr. Rep.* 312. The plaintiff's attorneys were fully notified by the moving papers that their authority to commence this action was disputed. They omitted to show any retainer, and put themselves upon the ground that the court had no power to require them to do so. Under the circumstances, it was a confession that they were without authority from the board.

No proof was offered that the board had refused to prosecute for ten days after complaint, accompanied with reasonable proof of a breach of the law, so that some other party had thereby acquired the right to prosecute in the name of the board, under the provisions of the law.

The action being strictly penal, it cannot be assumed, without evidence, that the right to prosecute has been so acquired by any informer. Had there been a complaint made to the board, the name of the informer could then be ascertained, and it would afford some security to the party prosecuted and to the public, against malicious actions. If every



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one may prosecute in the name of the board, unless the board choose to object, the provision in respect to laying the complaint before the board, with reasonable proof of a violation of the law, is nullified, and its effect abrogated by the construction of the courts. The board have no property. A judgment recovered against them for costs will not insure collection.

These reasons, with those adverted to by me at special term, confirm me in the opinion then expressed, that the law has imposed a condition with which informers must comply before they can prosecute, in the name of the board, for the recovery of penalties.

It may be that the ends of justice will be sufficiently attained by staying the plaintiff's proceedings, and I am therefore disposed to acquiesce in the modification of the order made at special term, which my brethren have thought proper to adopt.

It seemed to me at special term inconsistent, when the charge of prosecuting these actions without authority was not denied, not to dismiss them. If they were prosecuted without authority, as I think it evident they were, then the plaintiffs could not be held liable for costs, and the attorneys stood confessed as the instigators of the actions, and of course justly liable for the costs.

Order modified so far as to direct a stay of proceedings until further order.

[NEW YORK GENERAL TERM, February 3, 1862. *Ingraham, Clerke and Leonard*, Justices.]

GEORGE GOULD *vs.* CHARLES GOULD.

A cause of action for the conversion by the defendant of funds intrusted to him as an agent, for which he has not accounted to his principal, is assignable.

Such a cause of action would survive to the personal representatives.

J. G., the sister of the defendant, deposited funds with him, to be invested for her benefit. He invested them in certain stocks and bonds, which he afterwards sold, at a profit. He pretended to invest the proceeds in the purchase of certain city and rail road bonds, but instead of purchasing the same, he was himself the owner of such bonds, at the time, and merely charged the same to J. G., without her previous knowledge or assent, and appropriated the proceeds of the stocks and bonds, first sold, to his own use. He also overcharged J. G. for rail road bonds, which he claimed to have purchased for her, fraudently retaining the amount of the overcharge. He collected interest on the bonds, for which he never accounted; and he procured from her a release, discharging him from all liability to her on account of the use of the trust moneys by him, which was obtained by fraud and concealment, and executed in ignorance of the facts, and of her rights; *Held*, on demurrer, that these facts showed an illegal appropriation by the defendant of the funds intrusted to him, within the principle of the case of *Conkey v. Bond*, (34 Barb. 276;) and that the complaint stated a good cause of action.

*Held* also that the allegations in respect to the release executed by J. G. were entirely sufficient to avoid it.

Where an agent has duties to perform towards his principal, in the nature of a trust, he falls within the suspected relation, and the law indulges the presumption of fraud, against a release procured by him from his principal, although no fraud is visible to the eye of the court.

One cannot act for himself as vendor, and as agent for another, as purchaser, in transferring securities.

**A**PPEAL from a judgment rendered at a special term, overruling a demurrer to the complaint. The complaint alleged that some time in or about the year 1850, Julia Gould, the sister of the plaintiff and of the defendant, deposited with said defendant, as her trustee, a sum or sums of money owned and possessed by her at the time, and which the defendant engaged to take charge of as such trustee, and invest on her behalf in proper and safe securities, and account to her for the same; that said defendant, some time thereafter, invested said money, on behalf of said Julia Gould, in the

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stock of the Tonawanda Rail Road Company; that on account of said Julia Gould, some time thereafter, said stock was converted into thirty-five shares of the New York Central rail road stock, the par value of each share being \$100, and also \$1400 in the bonds of said company; that afterwards the defendant sold, on account of said Julia Gould, said thirty-five shares of the New York Central rail road company stock, and said \$1400 of bonds, and realized therefrom the sum of five thousand one hundred and sixty-six dollars, the stock having been sold for the sum of \$110 per share, and said bond or bonds for the sum of \$1316; that the defendant pretends that he, with the proceeds of said New York Central rail road stock, and bond or bonds, purchased for account of said Julia Gould, Alton city bonds, and a Michigan Southern Jackson Branch bond—the former at the rate of 85 per cent, and the latter at \$950, or 95 per cent. But the plaintiff averred that said investment, if made, was made without previous consultation with said Julia Gould. The plaintiff further alleged that the defendant further pretended that he exchanged said Alton city bonds and Michigan Southern Jackson Branch bond, for account of said Julia Gould, for the Chicago and Mississippi rail road bonds. But the plaintiff averred that said exchange of Alton city bonds and the Michigan Southern Jackson Branch bond was without previous consultation with said Julia Gould. That it is not true that the defendant invested the proceeds of said New York Central rail road stock and bonds of said company in the purchase, on account of said Julia Gould, of Alton city bonds and said Michigan Southern Jackson Branch bond; but the plaintiff averred that the defendant, at the time or times of said pretended purchases or investments in said Alton city bonds and Michigan Southern Jackson Branch bond, was himself the holder or owner of said bonds, and merely charged the same to the said Julia Gould, without her previous knowledge or assent, and appropriated to his own use the funds or proceeds of said New York Central rail road

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stock and said bonds of the company. That the defendant charged, on the 26th of November, 1853, to said Julia Gould, the sum of \$950, as paid by him for the said Michigan Southern Rail Road Jackson Branch bond, whereas the market value of the same at the time was only \$800, and which said bond the plaintiff averred was not purchased on account of said Julia Gould, but was the property of the defendant, and he appropriated the funds of said Julia Gould to his own use, and charged the said bond to her; or, if the same was purchased by the defendant for said Julia Gould, the same was purchased for no other price than that of \$800; and that the defendant had fraudulently overcharged Julia Gould for said bond the sum of \$150, and had fraudulently retained that amount and refused to credit her therewith. That in the same manner the defendant charged, on the 1st of March, 1854, and seeks to charge to said Julia Gould, the sum of \$3400, being at the rate of 85 per cent for so much paid by him, on account of said Julia Gould, for the Alton city bonds, being four of \$1000 each; whereas the market price of the same at the time was only \$2400, or 60 per cent, and which was the sum, if any, paid by him, whereby the defendant had fraudulently overcharged said Julia Gould the sum of \$1000, and had retained that amount. That the defendant pretends that on the 22d of November, 1853, he sold, for account of said Julia Gould, \$1400 of the said New York Central rail road bonds, hereinbefore mentioned, for \$1316, being at the rate of 94 per cent, whereas the market price of said bonds at the time was 95½ per cent; and he realized from said sale the sum of \$1333.50, and has thereby fraudulently and unjustly deprived her of the sum of said difference, being \$17.50, with interest. That the defendant, on or about the 7th of April, 1854, exchanged with the Chicago and Mississippi Rail Road Company eight bonds of the Michigan Southern Rail Road Jackson Branch of \$1000 each, and twenty-two Alton city bonds of \$1000 each, which included those hereinbefore mentioned as charged to

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said Julia Gould, and that he received in exchange bonds of the Chicago and Mississippi Rail Road Company, and a balance of \$80 in cash, and had refused to account with said Julia Gould or the plaintiff for the one-sixth part, or \$13.33, of said sum so received, and thereby had fraudulently and unjustly withheld that amount, and neglected and refused to credit said Julia Gould with the same, and fraudulently concealed from her the same. That the defendant, on or about the first day of March, 1854, collected the sum of \$240, being interest on \$4000 of the Alton city bonds, and which sum was so received for and on behalf of said Julia Gould, but which the defendant fraudulently concealed from the knowledge of said Julia Gould, and for which he has never accounted to her or the plaintiff. That about the 29th of September, 1859, the defendant applied to Julia Gould to exchange said \$4500 Chicago and Mississippi rail road bonds for bonds of the Hannibal and St. Joseph Rail Road Company, of the nominal value of \$4500, but only of the actual value of 60 per cent; and also, in consideration and as a condition of such exchange, required said Julia Gould to release him, the said Charles Gould, from any and all claim and demand, either legal or equitable, growing in any manner out of the use by said Charles Gould of the said moneys of said Julia, or the proceeds thereof, so held by him as her trustee aforesaid. That thereupon said Julia Gould did receive from said Charles Gould bonds of the Hannibal and St. Joseph Rail Road Company, and did allow him to retain as his own, in his own hands, the said Chicago and Mississippi rail road bonds in exchange therefor, and did execute the release, under seal, which said Charles Gould and his counsel had prepared, and which was of the tenor and effect before stated. That the defendant fraudulently, and by an abuse of the confidence of said Julia Gould, and by taking an undue advantage of her situation, and by having concealed from her the facts in relation to the items which he had over-

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charged to said Julia Gould, or neglected to credit to her, as before stated, did obtain from her the execution and delivery of the said release, the said Julia Gould at the time having no knowledge of the said several items, or her claim arising from the same, against the defendant. That said release contains false recitals, inserted therein by the defendant, from a fraudulent design of said defendant against Julia Gould, and with the falsity and design of which said Julia Gould was unacquainted at the time of the execution and delivery of said release. That the said defendant had never rendered an account to the said Julia Gould or the plaintiff of his said trust, or the transactions connected therewith. That Julia Gould, on or about the 27th day of April, 1861, for a valuable consideration, assigned in writing to the plaintiff all claim and demand which she had against the defendant, arising out of the transactions before mentioned, and that the plaintiff is now the owner of such claim and demand, and the real party in interest therein and in this action. That said Julia Gould and the plaintiff only discovered within the year 1860 the said items and fraud of the defendant, before stated. The plaintiff demanded judgment that the defendant account with him, as the assignee of Julia Gould, for the said moneys so intrusted to the defendant by said Julia Gould, or received by him on her account, and for the securities in which the same were invested; and that, if necessary, it be referred to some proper person as a referee to take such account, and that in taking such account the said several items of overcharge and omissions of credit to said Julia Gould might be charged against the defendant, with proper interest thereon; and that upon the coming in of the report of said referee, the plaintiff might have judgment against the defendant for any balance reported against him, and for general relief.

The defendant demurred to the complaint, and stated the following grounds of demurrer: *First.* That said complaint does not state facts sufficient to constitute a cause of action. *Second.* That the alleged cause of action set forth in said

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complaint is not assignable. *Third*. That the plaintiff is not entitled to maintain the same as assignee.

Judgment for the plaintiff on the demurrer, with leave to the defendant to answer.

*Wm. H. L. Barnes*, for the appellant.

*Mann & Rodman*, for the plaintiff.

*By the Court*, MASON, J. There is no doubt but that this cause of action is assignable. (*McKee v. Judd*, 2 *Kernan*, 622. *People v. Tioga Common Pleas*, 19 *Wend.* 73. *Hoyt v. Thompson*, 1 *Seld.* 347.) There is no doubt that such a cause of action would survive to the personal representatives. This, indeed, was admitted upon the argument by the defendant's counsel; and if it be so, the claim was certainly assignable. (*Zabriskie v. Smith*, 3 *Kernan*, 322. *Quin v. Moore and others*, 15 *N. Y. Rep.* 432.) The complaint alleges the deposit of funds in the hands of the defendant, to be invested by him, &c. for the benefit of the plaintiff; that the defendant did invest in the New York Central rail road stocks and bonds, and afterwards sold the same and realized therefrom \$5166. The allegations in folios 5, 6 and 7 of the complaint show an illegal appropriation of these funds, within the principle of the case of *Conkey v. Bond*, (34 *Barb.* 276.) If the complaint had stopped at this point, there is no doubt a good cause of action would have been stated; and I am of opinion that what follows does not take it away. There are, it seems to me very clearly, facts stated in this complaint constituting a good cause of action against the defendant; and the allegations in regard to the release executed by the plaintiff are entirely sufficient to avoid it. Upon the facts stated in the complaint the defendant cannot be regarded as technically a trustee, but is, as the judge at special term held, an agent of the plaintiff, having duties to perform towards the plaintiff in the nature of a trust, and

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where certainly he falls within the suspected relation. In such case the law indulges the presumption of fraud against this release, although it is not visible to the eye of the court. The defendant could not act in the capacity of agent for the plaintiff, and vendor for himself, in transferring these bonds, &c. (14 *N. Y. Rep.* 85. 20 *Barb.* 468.) But it is not necessary to place the case upon this ground; for the complaint alleges that the release was procured by fraud, and states facts showing it.

I advise the affirmance of the judgment of the special term.

Judgment affirmed.

[NEW YORK GENERAL TERM, February 8, 1862. *Leonard, Mason and Clerke*, Justices.]

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FRASCHIERIS vs. HENRIQUES and WILLET.

A vendor who has sold goods and drawn bills upon the purchaser, for the price, can rescind the sale, and sue for the value of the goods, if he has good cause for doing so, notwithstanding the bills, at the time of the commencement of the action, are out of his possession, so that he cannot then surrender them. If he produces the paper at the trial, and there offers to surrender it, or cancel the acceptances, that is sufficient. *INGRAHAM*, P. J. dissented.

**M**OTION for a new trial, upon a case and exceptions, ordered to be heard in the first instance at the general term, the judgment being in the meantime suspended. The complaint alleged that in August, 1857, the plaintiff, at Havana, in the island of Cuba, consigned to the defendant Henriques, at the city of New York, a quantity of cigars of the value of \$36,102.18; that said cigars arrived in the port of New York prior to the 26th day of September, and were deposited in a public storehouse, used for the purpose of storing goods prior to the payment of duties thereon, where said cigars remained on the 26th day of September, 1857. That the duties at the time remained unpaid. That on the



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said 26th September said property had never been in the actual possession of the defendant Henriques. That Henriques was, on the first day of August, 1857, insolvent and unable to pay his debts, and has ever since continued to be insolvent, which fact said Henriques fraudulently concealed from the plaintiff, and represented to the plaintiff that he was solvent, prosperous and successful in his business; all which representations were false, to the knowledge of said defendant Henriques, and were made for the purpose of procuring credit from the plaintiff for the property. That Henriques, on the 26th September, while so insolvent, and after he had suspended payment, executed to the defendant Willet some written transfer of said property, but that there was no delivery of the property, and that said writing was without any consideration, and that Willet paid nothing whatever for said property. The plaintiff further alleged, that before the property was removed from the public store, and before the duties or any portion thereof had been paid, and before the property came into the possession of either of the defendants, he notified them severally that he claimed the property, and all of it, and that he would not consent to the delivery thereof to the defendants, or either of them, and that he demanded from them the said property, and the bills of lading therefor. That no portion of said property had ever been paid for by said defendants, or either of them, but that they had converted the same to their own use, and now have the proceeds thereof, and refuse to deliver said property, or the avails thereof, to the plaintiff. Wherefore the plaintiff demanded judgment against the defendants for the value of the property, viz. \$36,102.18 with interest, besides costs.

The defendant Henriques put in an answer, in which he denied that the plaintiff made any consignment of cigars to him, but alleged that he purchased a bill of cigars of the plaintiff in the month of August, 1857, which amounted to the sum of \$36,102.18, at Havana, and the same were shipped from there for the defendant as his property, and exclusively

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at his risk and expense, and the same came to New York on or before the first day of September, 1857, together with the bill of lading, and said cigars the defendant received; and pursuant to the order and direction of the defendant, and as a matter of convenience to him, the same were by him stored in a public warehouse at the city of New York, under the warehousing system, as his property and subject to his order. That immediately upon such storing he commenced to pay duties and to withdraw them from such warehouse, and that he withdrew about \$14,000 worth thereof before the 26th day of September, 1857. He denied that on the first day of August, 1857, he was unable to pay his debts, or that he has since continued to be insolvent, or that he knew or believed he was insolvent or unable to pay his debts, or that he made any representations touching his circumstances which were untrue, or for the purpose of obtaining or procuring credit from the plaintiff for said property. He also denied that he ever executed to the defendant Willet any transfer of his property, or any part thereof, but he averred that on or before the 26th day of September, 1857, certain judgments had been recovered against him in the supreme court, amounting to upwards of \$50,000, and executions had been issued thereupon to the defendant Willet, as sheriff of the city and county of New York, for collection, and that said Willet levied upon all the cigars aforesaid remaining in said public warehouse, as well as all other property of the defendant, by virtue of such execution, and afterwards sold the same as such sheriff by virtue of and under such execution. He also denied that the plaintiff ever attempted to claim such property, or that he ever attempted to stop the same in *transitu*, or that he ever demanded the bill of lading covering the same. And he denied that any portion of said property had ever been paid for by the defendants, or either of them, but on the contrary thereof, he averred that payments had been made by him on account thereof. He also denied that the defendants had converted the cigars or any part thereof to their

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own use, or that either of them had the proceeds thereof, or that they had had the proceeds thereof since the commencement of this action, or any part thereof, but he averred that when the defendant Willet sold said cigars the proceeds of such sale were applied by him according to law, upon and in satisfaction of such execution; and he denied that the defendants had ever refused to deliver to the plaintiffs the said cigars, or the avails thereof.

The defendant Willet justified the taking of the goods, as sheriff of the city and county of New York, under and by virtue of sundry executions issued upon judgments recovered against Henriques; the cigars being the property of Henriques, at the time they were levied on and sold. On the trial the consignment of the cigars to the defendant Henriques, by the plaintiff, was proved. Also that bills of exchange were drawn by the plaintiff, upon Henriques, for the amount of the invoice, which were accepted by Henriques, and were subsequently negotiated by the plaintiff, and the same were not in his possession at the commencement of the suit. Evidence was given by the plaintiff tending to show fraud on the part of Henriques, in obtaining the goods, and fraudulent representations made by him, as to his condition and circumstances. The plaintiff produced in court the bills of exchange drawn by him upon Henriques, and offered to erase the acceptance of Henriques on each draft. At the close of the testimony the judge ordered the complaint to be dismissed, on the ground that the drafts of the plaintiff on Henriques were outstanding at the time of the commencement of this action; and that the non-surrender thereof before suit brought was a bar to the maintenance of the action.

*Beebe, Dean & Donohue*, for the plaintiff.

*Callaghan & Miller*, for the defendant Henriques.

*Brown, Hall & Vanderpoel*, for the defendant Willet.

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LEONARD, J. When it is conceded, as it must be on authority, that no tender or offer to surrender the promissory notes or other negotiable paper is necessary before the commencement of an action to recover the possession of goods fraudulently purchased, where the vendee only is liable thereon, and that the production of the paper at the trial and there offering to surrender or cancel it is sufficient, it is difficult to find any sound reason in principle for holding that there is a necessity that the vendor should have had the possession of the paper, or the power to surrender it at the time the action was commenced.

The paper was worthless. The courts have arrived at the conclusion that a tender of such notes before action is not necessary, and that the production and surrender at the trial is sufficient to prevent any damage from resulting to the vendee.

If the surrender at the trial is a sufficient protection where the vendor had the notes continuously from the time the vendee delivered them, it is equally sufficient, although at some period before the trial they were out of his possession.

The negotiation of the paper can make no difference. The technical rule requiring a tender<sup>a</sup> previous to the action is abrogated.

The principal question is, whether the vendee obtained the goods by fraud. He is a robber if he did, preying upon the honest trader, and not entitled to the benefit of any technical rules rendering it unnecessarily difficult to commence or maintain an action for the recovery of property which he has so fraudulently obtained.

The vendee will prevail, even where he has purchased fraudulently, if his notes be not surrendered at the trial. This rule will shield him from injustice, and that seems to me sufficient.

The ground upon which the judge placed his decision, in the rule entered upon the trial, renders the examination of other questions in the case unnecessary.

There should be a new trial, with costs to abide the event.

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CLERKE, J. concurred.

INGRAHAM, P. J. (dissenting.) The question argued by the appellant's counsel in this case is, whether a vendor who has sold goods and taken the note of the purchaser in payment can rescind the sale, if at the time of rescission the note is out of his possession, so that he cannot then deliver it, or whether a delivery at the trial is sufficient.

When the contract in this case was rescinded, the vendor had discounted the notes at a bank, and he neither had nor was entitled to have possession of them. The judge at the trial nonsuited the plaintiff, upon the ground that the notes had been negotiated and were outstanding at the time the contract was rescinded, and that the surrender of them at the trial was not sufficient. It must now be considered as settled law that where the vendor has the note of the purchaser he need not tender it to the debtor when he seeks to avoid a contract for fraud, but that it is sufficient to produce it on the trial to be returned or canceled.

But where it appears by the evidence that the note is at the time of rescission out of the possession of the vendor, and in the possession of a third person, a different question arises. It was very clear, under such circumstances, that the vendor seeking to obtain back the goods sold by him, could not place the purchaser in the condition he was at the time of the sale, if he had returned the goods. He would then have returned the property to the vendor, and he would have remained liable to the bank where the note was discounted, for the amount. Such cannot be the rule of law on this question. In the absence of any proof to the contrary, the possession of the note at the giving of it, and the possession at the trial, warrants the presumption that the note during the time that has elapsed since it was given has remained in the possession of the vendor. That presumption is destroyed, however, when proof is furnished that the note has been passed for value to a third person, and is at the time outstanding. The pur-

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chaser, under such circumstances, could not with safety restore the property and leave his notes outstanding, and the vendor had no right, while holding the proceeds of the notes given for the property, to demand also the property itself and leave to the purchaser the risk of getting rid of his notes by the redemption of them from the bank at a future time. We have been referred to an opinion of the learned justice before whom this case was tried, which was delivered by him in the general term in *Pomeroy v. Fellows*. This, at first, seems to be a contrary authority to the views expressed at the trial; but on examining that opinion I do not find that the same question arose. The evidence there was that *at some time* the notes had been discounted, and the point was whether proof that the drafts had once been discounted destroyed the presumption of title which arose from possession of them at the trial. The court held that the possession of the paper was stronger evidence of title at the time than could be indulged from proof of a previous discount. There does not appear to have been any evidence as to where the drafts were at the time of rescinding the contract. The latter opinion does not furnish any ground for the supposed contradictions, as suggested by the remarks of the plaintiff's counsel. This question was examined by BROWN, J. in *The Matteawan Co. v. Bentley*, (13 Barb. 641.) He says: "These notes the plaintiff got discounted at the bank and appropriated to its own use the proceeds. The notes were not the property of the plaintiff at the time the action was commenced, but they were then in the hands of the bank, where they remained until they reached maturity," &c. When the plaintiff demanded the property, no tender was made of money received at the time of sale, or offer to restore the notes. The plaintiff proceeded upon the idea of a right to affirm the contract so as to retain the money and the proceeds of the notes, and disaffirm it so far as to receive back the value of the property. This could not be done.

This rule, as applicable to an action upon the original con-

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tract, differs from that in which the party seeks to rescind a contract performed. In the first case the tender of the note need not be made at any time before the trial, and if produced might, in the language of these cases, be in season. But in the other class of cases the seller must be in a condition to return what he has received when he proposes to rescind. If he cannot do it, then, his attempted rescission fails. The case of *Nichols v. Michael* (23 N. Y. Rep. 264) has also been cited by the appellants. SELDEN, J. in that case says: "The negotiability of the notes in this case is of no importance so long as they have not been negotiated, nor do I think it would effect the rule if they had been, at some period, out of the hands of the plaintiff, provided the possession and exclusive interest was in them at the time of the trial." As an expression of opinion from the learned justice, this would be entitled to great weight as far as it would be applicable. It can hardly be considered as authority in a case in which he says the notes were not negotiated, and where it appears by the opinion of JAMES, J. a surrender of the notes was actually tendered, when the demand was made. Nor would it be an authority in the present case, because in the case cited the evidence showed that the possession was in the plaintiff when he made the demand for a return of the property.

The judgment should be rendered on the verdict, with costs.

New trial granted.

[NEW YORK GENERAL TERM, February 8, 1862. *Ingraham, Leonard and Clarke, Justices.*]

**SHERWOOD vs. BARTON and others.**

Where a promissory note, made by a partnership firm to one of its members, for money advanced by him to the firm, is indorsed by the payee to another, after maturity, the holder may maintain an action thereon, against the makers.

Such a note may be subject to any set-off which the partnership has; but if no such defense is shown, they cannot avail themselves of the defense that if the note had remained the property of the payee, his remedy would have been by another form of action.

**A**PPEAL from a judgment entered upon the report of a referee. The action was brought upon a promissory note, by the indorsee, against the makers. The referee reported in favor of the defendants.

*By the Court*, INGRAHAM, P. J. This action is brought upon a note made by a firm to one of its members, for money advanced by such partner to the firm. The note was indorsed by the payee to the plaintiff. The referee held that inasmuch as the payee, being one of the partners, could not maintain an action against the firm, therefore the holder could not recover when it was transferred by the payee; except in the case of a *bona fide* holder for value. The referee also found that the plaintiff took the note after maturity. It is settled that a partner cannot maintain an action against the firm on such a note. And it is equally well settled that the holder may maintain an action, where such a note is transferred before maturity, for value. (*Smith v. Lusher*, 5 Cowen, 688.) The only question in this case, remaining, is whether the holder may not recover if the note is taken after maturity. It must be remembered that in this case the defense is not to the consideration. The note was given for money actually advanced to the firm. Its validity is not questioned. In the hands of the partner it was a valid security against the firm, for the face of it, that could at any time have been enforced by the partner, against the firm; and the only difficulty was as to the remedy to which the



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partner must resort for its collection. He could not maintain an action at law, because to do so he would have to sue himself with the other partners, and would have to resort to a court of equity for relief. But still the demand would remain a valid claim, on his part, subject only to be diminished by indebtedness on his part, to the firm, if any should be found to exist. In the case cited from *5th Cowen*, it was shown that the holder of the note had knowledge, before taking it, that the payee from whom he received it had a notice that the payee was one of the firm. This destroyed the *bona fides* of his possession, so far as notice was necessary to do so. It might have been said that the knowledge of this fact should have put him on his guard, and he should not have taken such a note. But the chancellor says, "as the facts so known did not invalidate the note, against the partners, the knowledge of those facts cannot affect the claim of the plaintiff." And Colden, senator, says, at page 711, "such a note, in the hands of one of the firm, the world has a right to regard as an evidence of a debt due from the firm to the partner to whom it is given. The indorsee is justified in taking the note, although he may know and see upon its face that his indorser is one of the firm, and when the indorsee brings the action there are no technical obstacles to his recovery."

But the claim of the plaintiff is only in accordance with the contract. The firm promised to pay a sum of money received by them from their partner, to him, or to the person he might order to receive it. By the indorsement he ordered the payment to be made to the plaintiff. So long as the defendants have no objection to the original consideration and to the validity of the note, the transfer of it to the plaintiff made the firm liable to him for the amount of it. It may have been subject to any offset which the firm had, but no such defense was proved; and in the absence of such proof, the defendants cannot avail themselves of the defense that

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Hubbard v. New York and Harlem R. R. Company.

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if this note had been the property of the payee, his remedy was by another form of action.

The judgment must be reversed, and a new trial ordered; costs to abide the event.

[NEW YORK GENERAL TERM, February 8, 1862. *Ingraham, Leonard and Clarke, Justices.*]

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HUBBARD vs. THE NEW YORK AND HARLEM RAIL ROAD COMPANY.

A bond, issued by a rail road company, acknowledged the receipt of \$1000 from . . . . ., and in consideration thereof the company promised and agreed to pay to . . . . ., or assigns, the sum of \$1000, ten years after date, &c. In an action upon the bond, the complaint averred that the corporation received the money from some person unknown to the plaintiff, and delivered the bond to such person for the purpose and with the intent that the same should be assignable and transferable by delivery from hand to hand; that before its maturity it came lawfully into the possession of the plaintiff, for value, and that he was the owner and holder. *Held*, on demurrer, that the complaint was sufficient, and that the action would lie, any lawful holder by delivery or transfer being authorized to fill his own name into the blank, as the payee.

*Held, also*, that bonds in that form were not void as being in violation of the act to restrain unauthorized banking; inasmuch as they were payable ten years after date, instead of on demand, and therefore could not circulate as money.

**A**PPEAL from a judgment at the circuit, rendered for the plaintiff on account of the frivolousness of the demurrer to the complaint.

*C. W. Sandford*, for the appellants.

*N. A. Cowdrey*, for the respondent.

*By the Court*, LEONARD, J. The action is upon two of the Dover extension bonds of the rail road company, dated in 1849, payable August 1, 1859, for \$1000 each. These

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bonds acknowledge the receipt of \$1000 from -----, and in consideration thereof, the rail road company promise and agree to pay to ----- or assigns the sum of, &c. The name of the person from whom the money was received, and of the payee, are left in blank.

The complaint avers that the corporation received the money from some person unknown to the plaintiff, and delivered the bond to such person for the purpose and with the intent that the same should be assignable and transferable by delivery from hand to hand, without other writing; that before its maturity it came lawfully into the possession of the plaintiff for value, and that he is the owner and holder. The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. On motion, at special term, judgment was rendered for the plaintiff, on account of the frivolousness of the demurrer, and the defendants have appealed from the judgment.

The defendants insist that the alleged intent is inconsistent with the instrument itself, and cannot be the subject of proof. There are numerous authorities holding that the bond of a corporation payable to an individual or *bearer* is a negotiable instrument. The word bearer, in such case, includes the holder, whoever he may be. I am not aware, however, of any decision that an obligation payable, as these are, to an individual or his assigns, has been holden to be negotiable by mere delivery.

The averments of the complaint, however, take the case out of any difficulty on that subject. These bonds were left in blank, as to the payee, intentionally, so that they might be transferred by delivery. The intent is admitted by the demurrer. The plaintiff, or any other lawful holder by delivery or transfer, may now fill his own name into the blank as the payee. (*Mitchell v. Culver*, 7 Cowen, 336. *Boyd v. Brotherson*, 10 Wend. 93. *Ex parte Kerwin*, 8 Cowen, 118. *Clute v. Small*, 17 Wend. 238, 243.) The intent alleged

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Benedict v. Martin.

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appears to be in harmony with the instrument. It in no manner contradicts its tenor or effect.

The defendants also insist that if the averment of intent be true, then the instrument is in violation of the act to restrain unauthorized banking, and therefore void. This is an ungracious objection, after the acknowledgment of the receipt of the money contained in the bonds. It is, however, without any foundation. They are payable ten years after date, and cannot be circulated as money. Obligations which circulate as money are payable on demand.

The objections to the complaint are untenable. I have given more attention to the decision of this appeal than the questions involved warrant, because the counsel for the defense was absent when the cause was reached on the calendar, and it was submitted on his points without oral argument.

Judgment is affirmed, with costs.

[NEW YORK GENERAL TERM, February 8, 1862. *Ingraham, Leonard and Clarke, Justices.*]

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BENEDICT vs. MARTIN.

The plaintiff and defendant being owners of adjoining lots, the latter built a wall upon his lot, along the boundary line between them; the same being constructed for him by D. and C. under a written contract. The defendant furnished the materials only, but employed no workmen and exercised no control over them. *Held* that the defendant was not liable to the plaintiff for damages caused by the blowing down of the wall, before it was completed; the relation of master and servant, or principal and agent, not existing between the defendant and those by whom the wall was constructed.

**A**PPEAL from a judgment entered at a special term. The plaintiff and defendant were owners of contiguous lots of land. The defendant erected a wall on his lot along the boundary of the plaintiff's lot. The defendant, by written

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agreement, contracted with third parties for the erection of the wall. The third parties were men of good reputation, and careful workmen. They did the work entirely without the defendant's interference. Before the wall was finished it was blown down during a thunder storm, and caused damage to the plaintiff's property on his adjoining lot. The defendant's counsel moved for a nonsuit, on the ground that the defendant was not liable, because the work was done by independent contractors, and was not interfered with by the defendant. There were also exceptions to the judge's charge on this same point. The jury, under the judge's charge, found for the plaintiff. Judgment was entered, and this appeal was brought, by the defendant.

*E. S. Van Winkle and W. R. Martin*, for the appellant.

*W. W. Badger*, for the respondent.

LEONARD, J. The relation of master and servant, or principal and agent, must exist between the defendant and those by whom the wall was constructed which occasioned the injury complained of, or the defendant cannot be held responsible in this action.

The wall was constructed by contract between the defendant, who owned the land upon which it was built, and Davis and Cochran, builders, to be paid for at certain fixed periods as the wall advanced, at five cents per square foot for part, and at two dollars and twenty-five cents per thousand brick for inside work.

The defendant furnished the materials only. He employed no workmen, and exercised no control over them. He could exercise no control over the contractors, as to the conduct of the work, or the hands whom they should employ or discharge. He could give no direction as to the manner of bracing or sustaining the wall while it was in process of con-

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struction. The workmen employed could not look to the defendant for payment of their services.

In such case the negligence, if any, which occasioned the injury of which the plaintiff complains, was not attributable to the defendant. (*Pack v. The Mayor &c.*, 4 *Seld.* 222. *Kelly v. The Mayor &c.*, 1 *Kern.* 432.)

The justice at the circuit held this principle not applicable to the case, and directed the jury to inquire only whether the injury occurred by negligence. This was erroneous. The question whether the relation of master and servant, or principal and agent, existed between the defendant and the contractor, should not have been withdrawn from the jury. As the evidence stood, I think the complaint should have been dismissed.

It is proper to observe, that these rulings were made at the circuit for the purpose of allowing the questions to be brought before the general term, as it appears from the charge of the judge.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

CLERKE, J. As there was no conflict of testimony as to the relation between the defendant and the builders, there was nothing for the jury, on that subject; and the judge was correct in assuming that duty himself. But I think he erred in giving the construction to it which he did give. I concur therefore in the conclusions of the above opinion.

INGRAHAM, J. also concurred.

New trial granted.

[NEW YORK GENERAL TERM, February 8, 1862. *Ingraham, Leonard and Clarke*, Justices.]

**THE AMERICAN EXCHANGE BANK vs. WEBB and MINOR.**

A provision, in an assignment executed by a debtor in trust for the benefit of his creditors, directing the payment of a fictitious demand to the assignor's wife, renders the assignment void, as intended to hinder and delay creditors. Where a wife thus provided for in an assignment made by her husband, delivered a release of her dower in his real estate, upon condition that if the assignment should be held valid she should receive the amount directed to be paid to her by the assignment, and if held invalid, that she should have her dower out of the proceeds, and the plaintiff, a creditor, assented to these terms, and to a sale of the property in accordance therewith; *Held* that this did not amount to a ratification of the assignment by him, or estop him from attacking it as fraudulent and void, and having the same set aside. CLERKE, J. dissented.

**A**PPEAL from a judgment ordered at a special term, dismissing the complaint, with costs. The action was brought by the plaintiff, a judgment creditor of the defendant Webb, to set aside an assignment executed by him, of his property to the defendant Minor, in trust for the benefit of creditors.

*Cleaveland & Titus*, for the appellant.

*D. R. Jaques*, for the respondent Minor.

*C. C. Marsh*, for the respondent Webb.

INGRAHAM, P. J. This action was brought to set aside a voluntary assignment made by George Webb to Minor, on the ground of fraud. A principal ground of fraud was a provision for the payment to the wife of the assignor of a demand alleged to be fictitious. Evidence was given upon the trial for the purpose of proving that the husband received the property of the wife and a part of her separate estate. Afterwards the assignee proceeded to sell the assigned property, the wife consenting to join in the sale and conveyance, so as to release her dower and make a perfect title. Notice of this was given to the plaintiff, and that the wife would unite in the sale if the assignee was not interfered with in

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executing the trusts of the assignment; to which the president replied that he was in favor of selling the assigned property during the next month. The judge, upon the trial, found that the deed of assignment was made by Webb with the fraudulent intent of hindering and delaying his creditors. That the notice was given to the plaintiff of the willingness of Mrs. Webb to join in the sale, to which the plaintiff, by its president, sent the answer referred to, and also consented to a stay of proceedings, and, on receipt of its share of the proceeds of the sale, to discontinue this action; but such consent was not given by authority of the board. That proceedings were taken by other creditors to set aside the assignment, and that the proceeds of the sale were then deposited in the trust company. That Mrs. Webb united in such sale, about June, 1855, by executing the deed, but that she had not, in May, 1855, determined to release her dower if her claim under said assignment was to be made a subject of litigation; and that the release of dower was delivered under a condition by which she was to be protected. The judge, at special term, dismissed the complaint. The plaintiff excepted to the decision of the court.

For the purpose of this appeal, we must consider the facts as found by the judge to be sustained by the evidence, viz. that the assignment was made to delay and hinder creditors, and therefore void; that Mrs. Webb delivered the release of dower upon condition that if the assignment was held valid she should receive the amount provided for her under the assignment, and if invalid, that she should have her dower out of the proceeds; and that the plaintiff assented to these terms, although there is no direct finding of this character.

The defendants claim that these acts of the president of the bank were a ratification of the assignment, and that the plaintiff is estopped from now claiming that the assignment is void. There can be no doubt but that, independent of this question, and with the finding of the judge as to the



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character of the assignment, the court should have declared the assignment void. We cannot look into the evidence, on this appeal, to see if the judge might not have erred in such finding. Even if that question could properly come before us, the evidence is such as to make his finding conclusive. Nor does the relation which the wife bears to this transaction prevent the plaintiff from objecting to the validity of the assignment. It is true that she gave a release of her interest in the property, but when she delivered it she provided for her protection by stipulating either for the payment to her of the amount secured to her in the assignment, or if that should be found to be invalid, then that she should be entitled to her dower. Conceding that the plaintiff agreed to all these terms, and to the sale, there was nothing, as between the bank and Mrs. Webb, which prevented it from insisting on the illegality of the assignment. The president of the bank and Mrs. Webb both contemplated that as one of the possibilities, in the settlement of the estate. They both provided for what should be done if the assignment was held to be void. If the plaintiff can be held responsible for these acts of its president, it could only be to compel it to assent, in such an event, to her being paid the value of her dower interest in the assigned property, out of the proceeds of the sale. Nor is the question of the wife's right to be paid out of the assigned property, any thing due her for her separate estate, held by the husband, involved in this action. It may be that she has a claim against the assignee, or against the fund, in whosever hands it may go, to have her separate estate repaid to her; but such claim cannot make an assignment, otherwise invalid for fraud, operative in favor of the other preferred creditors therein.

The cases referred to by the judge at special term were principally cases in which the right of the purchaser to protection under the sale was mainly in issue. If that question was involved here, the conclusion might be different as to the effect of the acts of these parties. But in this case no such

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question arises. The sale may be held valid, while the parties may claim that the proceeds of the sale shall not be distributed according to the provisions of a deed which is held to be fraudulent. My conclusions are, that there is nothing in the acts of the parties which prevents the plaintiff from attacking the good faith of this assignment; and that all the parties in the arrangements for the sale of the property contemplated that the assignment might be declared void, and provided, in such a case, for the protection of Mrs. Webb, either by payment to her of her separate estate, which had been received by her husband, or by securing to her the value of her dower and the real estate which she had released.

I am therefore of the opinion that the complaint should not have been dismissed.

Judgment reversed and a new trial ordered; costs to abide the event.

LEONARD, J. concurred.

CLERKE, J. dissented.

New trial granted.

[NEW YORK GENERAL TERM, February 3, 1862. *Ingraham, Leonard and Clerke, Justices.*]

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TAYLOR vs. ALLEN.

The receipt of a bill or note having time to run, from the party primarily liable on a bill or note then overdue, does not operate to discharge an indorser on the bill or note so overdue, unless there is an agreement express or implied that the new bill or draft shall be in payment of the former, or extending the time of payment in favor of some party who is liable thereon, prior to such indorser.

If a new draft is taken, by the holder of a protested note, as collateral to such note, this will not prevent him from enforcing payment of the note.

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And if there is some evidence that a draft was thus taken, the question should be submitted to the jury whether there was an agreement to extend the time of payment on the protested note, or whether the new was given and received as collateral to the old security.

THIS action was commenced against the defendant as indorser of a promissory note for \$2060, made by Parmelee & Watts, of Des Moines, Iowa, dated November 11, 1857, payable four months after date, to the order of the defendant, and indorsed by him. The answer avers that the plaintiff, by agreement with the makers of the note, without the consent of the defendant, extended the time of payment of the note in suit, by taking a new acceptance of the makers for the amount of the old note, interest and charges, dated June 15, 1858, payable sixty days after date. The issue thus joined was tried before Mr. Justice SUTHERLAND and a jury, October 18, 1859. The facts appearing on the trial are as follows: Parmelee & Watts, who reside at Des Moines, Iowa, had large business transactions with the plaintiff, and were indebted to him. The defendant was a banker at Des Moines, and Parmelee & Watts kept their current bank account at his bank. George T. Jenkins, who had acted as agent for the plaintiff, proposed to Parmelee & Watts to get a loan for them of \$3000 on their note, indorsed by the defendant, and accordingly drew a note for \$3000, dated June 1st, 1857, payable six months after date, to the order of the defendant, which Parmelee & Watts signed. This note of June 1, 1857, was brought to the defendant by Jenkins "ready signed by Parmelee & Watts," with the defendant's name as payee; the defendant at first declined to indorse it; but finally, at the urgent request of Jenkins, indorsed it. The note was negotiated at Baltimore, by the plaintiff, or through him, at a heavy discount, the proceeds being only \$2800. These proceeds were remitted to the defendant by Jenkins, and deposited by the defendant to the credit of the makers of the note in their bank account with him. Early in November, 1857, nearly a month before this \$3000 note

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matured, Jenkins urged the defendant to make an arrangement to provide for the payment of it; the defendant at first declined, but finally, on Jenkins undertaking to get McGavie, Chittenden & Co., who were also indorsers, to pay \$500 in cash on account, he consented to pay \$500, and indorse a new note of Parmelee & Watts for the balance. Jenkins then got Parmelee & Watts to sign a new note, dated November 11, 1857, for \$2060, and interest at 10 per cent, payable four months after date, to the order of the defendant. The last mentioned note for \$2060, dated November 11, 1857, is the note in suit. It was indorsed by the defendant and delivered to the plaintiff. It did not appear whether the \$3000 note was given up or not. The note for 2060 matured March 11th-14th, 1858. On the 15th April, the plaintiff, being the holder of this note, having paid and taken up the same at the Union Bank of Baltimore, where it had been discounted, made out an account against Parmelee & Watts, charging them with the principal of the note, \$2060, and interest to date of maturity at 10 per cent, protest fees and other charges, making a total of \$2137.90. He then added for three months' additional interest at 6 per cent, and 2 per cent additional, making a total of \$2217.53, and drew his draft on Parmelee & Watts in these words:

“ \$2217 <sup>53</sup>/<sub>100</sub>

Baltimore, April 15th, 1858.

Sixty days after date, pay to the order of Taylor & Gardner twenty-two hundred and seventeen <sup>53</sup>/<sub>100</sub> dollars, with exchange on Baltimore, value received, *acceptance waived*.

HENRY S. TAYLOR.

To Messrs. Parmlee &amp; Watts,

Des Moines, Iowa.”

He sent this draft to the drawees in a letter of the same date, in which he says: “ We have to-day *succeeded in negotiating a draft on you for \$2217.53, which please accept*. We wish some arrangement made by which the money will be ready to meet this draft at maturity, and hoping to hear

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soon in reference to it, I remain, &c.” This draft was accepted by Parmelee & Watts after the commencement of this suit. The plaintiff did not communicate with the defendant in reference to this draft, nor request him to consent to its acceptance. The defendant never did consent to it. The draft was shown to him by Parmelee, and the defendant refused to consent to the acceptances, or to do any thing further. The old note for \$2060 was retained by the plaintiff, and after the negotiation by him of the draft on Parmelee & Watts, and on the same day, this action was commenced against the defendant alone, as indorser.

At the close of the evidence, the court decided and held that the case presented no question of fact for the jury, and, although requested by the plaintiff's counsel so to do, refused to submit any question of fact to the jury. To which decision and refusal the counsel for the plaintiff excepted; and the court directed the jury to find a verdict in favor of the defendant. To which direction the counsel for the plaintiff also excepted; and thereupon the jury, by direction of the court, found a verdict for the defendant, and the plaintiff appealed from the judgment.

*Mott, Murray & Harris*, for the appellant.

*Wm. A. Butler*, for the respondent.

*By the Court*, LEONARD, J. The receipt of a bill or note having time to run, from the party primarily liable on a bill or note then overdue, does not operate to discharge an indorser on the bill or note so overdue, unless there is an agreement express or implied that the new bill or draft is in payment of the former, or extending the time of payment in favor of some party who is liable thereon prior to such indorser.

Where it has been expressly agreed that the new note was received as collateral security to the note overdue, the right

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of immediate action on the note so overdue is not suspended, and the indorser or surety is not discharged. (*Myers v. Welles*, 5 *Hill*, 463. *Fellows v. Prentiss*, 3 *Denio*, 512. *Hart v. Hudson*, 6 *Duer*, 294. *Huffman v. Hulbert*, 13 *Wend.* 375. *McLean v. Lafayette Bank*, 3 *McLean*, 589.)

In the present case there was no express agreement to extend the time of payment on the note overdue.

There is some evidence that the new draft was taken by the plaintiff as collateral to the former note. If this was so, there was nothing to prevent the plaintiff from enforcing payment of the protested note. The question should have been submitted to the jury whether there was an agreement to extend the time of payment on the protested note, or whether the new was given and received as collateral to the old security.

There must be a new trial, with costs to abide the event.

[NEW YORK GENERAL TERM, February 8, 1862. *Ingraham, Leonard and Clerks*, Justices.]

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KETELTAS, receiver &c., vs. WILSON and others.

A trust, in an assignment made for the benefit of creditors, "to pay the legal and necessary expenses of the assignees, with a salary to each of them at the rate of two thousand dollars per year while actually engaged in executing the trust, if that compensation do not exceed what the laws of the state allow to executors; if it should exceed that amount, then at the rate so prescribed for executors, &c.," does not render the assignment illegal, the provision being a limitation, and not an enlargement, of the legal claims of the assignees.

The liability of bail, or sureties, is one eminently of a confidential character; and the right of debtors, on making an assignment for the benefit of creditors, to prefer any legal obligation, is undoubted. *Per* LEONARD, J.

Hence, a trust requiring the assignees, after having satisfied certain prior trusts, to pay all persons who had theretofore become bail or surety for the assignors such sums as they may have paid, and as may be legally chargeable to the assignors by reason of the liability devolving on such bail or

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sureties; or to pay such sums as are requisite in law for the discharge of such bail or surety, is not illegal.

Yet where it appeared in evidence that the assignors, though urgently pressed by their creditors with suits to recover their debts, were unwilling to make an assignment, but finally, at the suggestion of a third party, and on account of the rough proceedings of creditors, they executed one, giving a preference in favor of bail and sureties, for the declared object of effecting a delay of several years by the operation of this clause, knowing that the clause would produce that effect, and with the intent of putting off creditors, and gaining time to enable the assignors in the meantime to compromise with them; *Held* that the assignment was made to hinder, delay and defraud creditors, and was void as against them.

An insolvent is permitted, by law, to create a trust for the payment of his creditors, and to prefer any of his legal liabilities in the order of payment; but it must be made honestly, for the sole object of providing for the payment of his debts. The debtor is expressly forbidden to make transfers of his property to hinder or delay his creditors; and every such transfer is declared by law to be fraudulent and void. *Per* LEONARD, J.

**T**HIS was an appeal from a judgment entered upon the report of a referee dismissing the plaintiff's complaint. The plaintiff was appointed receiver in several supplemental proceedings, and as such, commenced this action to set aside an assignment made by L. O. Wilson & Co. for the alleged benefit of their creditors. This assignment, not under seal, purports to assign all the property of said firm, real and personal, and all its assets in trust. 1. To sell the assigned property and collect the debts. 2. To pay the legal and necessary expenses of the said assignees, with a salary to each of them (two) at the rate of \$2000 per year while actually engaged in executing the trust, if that compensation do not exceed what the laws of the state allow to executors or administrators; if it should exceed that amount, then at the rate so prescribed for executors and administrators. 3. To pay the bills or drafts drawn by L. O. Wilson & Co. upon and accepted by Bates & Wilson with interest, and other lawful charges thereon. 4. "After having satisfied the preceding trusts," to pay all persons who had theretofore become bail or surety for L. O. Wilson & Co., such sums as they had paid which were legally chargeable to L. O. Wilson & Co.,

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or to pay such sums as should be requisite and demandable in law for the discharge of such bail or surety. 5. "In the next place, after satisfying such preceding trusts," to pay all other liabilities of the firm in full, if possible; but if the fund was not sufficient for that purpose, then pro rata.

As conclusions of law, the referee found that the assignment was not made with intent to hinder, delay or defraud creditors, and was not fraudulent or void as against the plaintiff or other creditors of said firm of L. O. Wilson & Co. And he reported that the defendants were entitled to judgment, and that the complaint be dismissed, with costs. From the judgment entered upon this report, the plaintiff appealed.

*C. Bainbridge Smith*, for the appellant.

*Wm. C. Traphagen*, for the respondents.

*By the Court*, LEONARD, J. The plaintiff seeks to have an assignment for the benefit of creditors declared fraudulent and void; first, for the reason that the provisions of the instrument itself are illegal, and second, on account of the fraudulent intent of the assignors, as matter of fact, appearing from the parol evidence taken in the action.

There are two provisions which the plaintiffs allege to be objectionable: 1st. A trust to pay the legal and necessary expenses of the assignees, with a salary to each of them at the rate of two thousand dollars per year while actually engaged in executing the trust, if that compensation do not exceed what the laws of the state allow to executors or administrators; if it should exceed that amount, then at the rate so prescribed for executors and administrators. 2d. The fourth trust, whereby the assignees are directed, after having satisfied the preceding trusts, to pay all persons who had theretofore become bail or surety for L. O. Wilson & Co. (the assignors) such sums as they may have paid, and as may be legally chargeable to L. O. Wilson & Co., by reason of the



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liability devolving on such bail or surety, or to pay such sums as are requisite in law for the discharge of such bail or surety.

The next provision directs the payments of all other creditors in full, if the estate is sufficient; if not, then they are to be paid pro rata.

The referee has found adversely to the plaintiff, both as to the questions of law involved from the provisions of the assignment, and as to the facts arising on the evidence of alleged fraud, not apparent from the face of the instrument. In this respect we entirely concur with the referee, for the reasons assigned by him.

The provision in respect to the compensation of the assignees is a limitation, and not an enlargement of their legal claims. The liability of bail or sureties is one eminently of a confidential character, and the right of the assignors to prefer any legal obligation is undoubted.

The question of fact, arising from the evidence showing an intent on the part of the assignors to hinder and delay creditors, by the intervention of the assignment, and the provision therein for the payment and indemnity of persons who have become bail or surety for the assignors, gives rise to very serious doubts as to the bona fides of the assignment. After a careful consideration of the evidence, my mind is irresistibly drawn to the conclusion that the intention of the assignors was fraudulent in the respect indicated. Neither the assignors nor the assignees knew who were the persons preferred, or the extent of the liability, at the time the assignment was executed; nor had they ascertained at the time of the trial. The assignors were urgently pressed by their creditors with suits to recover their debts, but up to the day the assignment was executed they were opposed to the measure. The resort to an assignment, with the preference in favor of bail and sureties, was made at the suggestion of a third party, on account of the rough urgency of creditors, for the declared object of effecting a delay of several years

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by the operation of this clause. One of the assignors testified that he knew the assignment would produce such delay, as a matter of course, by reason of the clause preferring the bail and surety. The same assignor also testified that he made the assignment with the intent of putting off creditors and gaining time. He was asked this question, viz: "Did you make the assignment in question with the object and intent of putting off your creditors and gaining time to enable you in the meantime to compromise with them?" to which inquiry he answered, "Yes." The witness afterwards states, on cross-examination by counsel for the assignees, that he made the assignment under the advice of counsel, whose attention was called to the provision for bail, and who advised that it was right.

I think the advice of counsel cannot prevent the natural effect of the previous evidence, that the assignment was made to prevent creditors from getting their pay until they would accept the debtor's terms of compromise, and not for the sole purpose of providing for the payment of creditors.

An insolvent is permitted by law to create a trust for the payment of his creditors, and to prefer any of his legal liabilities in the order of payment; but it must be made honestly, for the sole object of providing for the payment of his debts. The debtor is expressly forbidden to make transfers of his property to hinder or delay his creditors, and every such transfer is declared by law to be fraudulent and void. In opposition to these considerations, we have not failed to observe that the facts found by a referee are not to be disturbed where there is any doubt, or where there is a conflict of evidence. We know, also, that courts are astute to sustain the verdicts of juries and the reports of referees in their conclusions of fact from the evidence.

In the present case there is no suspicion of any collusion by the witness (one of the assignors) with the creditors, or to his entertaining feelings or objects adverse to the assignees. It appears to me that there is a plain confession by the wit-

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ness, who is the principal of the insolvent firm, of an intent, in executing the assignment, which the law pronounces fraudulent. There is no conflict of evidence. The result which the assignors contemplated, according to the evidence, has been produced. At the trial more than three years had elapsed, and neither assignors or assignees were able to state the extent of the liability, or the names of the persons, embraced in the provisions of the fourth preference. The assignees considered it improper to pay the creditors in the next class, who constituted the greater number, and largest amount, because the extent of the liability of the fund to pay the claims of bail and surety had not been ascertained. And so the fund must remain for an indefinite period—perhaps twenty years—unless the creditors are willing to accept such terms of compromise as the debtors choose to offer. A debtor has no right, legal or moral, to apply any coercion to his creditor. Yet such is the effect of this provision. Not a dollar has been paid to any person for liability as bail or surety for the assignors, so far as the evidence shows; and none, perhaps, will ever be required. If this result were not accompanied by the intent, clearly and unequivocally proven, that delay to creditors should ensue from the assignment, it would pass, probably, as an honest transaction, which, although operating hardly upon the general creditors, must nevertheless be upheld.

I think the referee erred in finding that the assignment was not made to hinder, delay or defraud creditors, and in his conclusion that it was not void as against the plaintiff and other creditors of the assignors.

The judgment should be reversed, the report set aside and the case sent back to the referee for a new trial, with costs to abide the event.

[NEW YORK GENERAL TERM, February 3, 1862. *Ingraham, Leonard and Clarke, Justices.*]

**HANNAH TOBIAS vs. HENRIETTA KETCHUM and others.**

A testator, by his will, gave to his wife certain articles of personal property and one-third of the net income of all his real estate, after payment of all taxes, assessments and interest due thereon, during her natural life. Upon her death the payments were to cease, and the said one-third of the net income was to go and be paid to the heirs of the testator. The provisions were not stated to be in lieu of dower. *Held* that the widow was not put to her election.

**T**HIS is an action for the recovery and admeasurement of dower, and for the recovery of mesne profits. The complaint contains the proper allegations of marriage, seisin, and death of the husband, describes the land, states the mesne profits received by the defendants and their possession, and that dower has not been assigned. The answer controverts no allegation of the complaint; but it sets up as defenses that the husband made a provision for the plaintiff in lieu of dower, by his will, and she accepted the same; and also that she has released her dower. The issue was tried at the New York circuit. The will was put in evidence. It gave the plaintiff, wife of the testator, certain articles of personal property, "and one-third of the net income of all the real estate that to me now belongs, or that to me may at the time of my decease belong, after all taxes, assessments and interests due thereon is paid: to have and to hold the said net third of the income of said real estate during her natural life. The proportion thereof to commence to be paid to her six months after my decease, and to continue to be paid to her every six months thereafter, till her decease, when the same shall cease, and shall then go and be paid to my heirs, as hereinafter stated." A codicil was also put in evidence, by which certain apartments of a dwelling house were appropriated to the personal use of the plaintiff; and a further provision was made for her support during the first six months after the testator's death. Neither the will nor the codicil state, in any form, that the provisions made for the widow are in lieu of dower

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The court decided that by the true construction of the will the provisions in favor of the plaintiff were in lieu of dower; and on that ground alone ordered a verdict for the defendants. The plaintiff excepted to such decision, and made a case containing her exceptions, and she now applied in the first instance at the general term for a new trial.

*Justus Palmer and Chas. Tracy*, for the plaintiff.

*Stillwell & Swain*, for the defendants.

*By the Court*, INGRAHAM, P. J. The will of the testator gives to the plaintiff, his wife, all his furniture and jewelry, and one-third of the net income of all his real estate, after payment of all taxes, assessments and interest due thereon. After the death of the wife it gives the residue of the estate to the children. No disposition is made of the residue of the income during the life of the widow. The codicil made no alteration in the will, but added to it, by giving to the wife certain rooms in one of his houses, for her residence, and providing for the payment to her of some money during the first six months after his decease. The widow now claims dower, in addition to the devise under the will.

The intent to deprive the widow of her dower by a bequest or devise in the will, must be apparent from the will, (*Lewis v. Smith*, 5 *Selden*, 502;) and where there is no direct expression of the testator's intent to take away dower, the question is whether the will contains any thing inconsistent with the assertion of a right to dower. The devises in the will must be so repugnant to the claim for dower that they cannot stand together. Such is the language of Denio, J. in the case last referred to. (*See authorities there cited.*)

In *Mills v. Mills*, (28 *Barb.* 454,) the same rule was applied; and in that case the court held that in no case is a person to be put to an election, unless it is clear that the provision of the instrument under which he is entitled to a

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benefit would be in some degree defeated by the assertion of his other right. In that case the will gave the wife one-third during life, and directed the residue to be divided among his children on his youngest child coming of age; and the court held the widow was entitled to her dower.

In *Dodge v. Dodge*, (31 Barb. 413,) certain property was given to the wife during life, and an annuity in money was given her, charged upon certain other real estate, and the residue of the estate was disposed of in separate parcels to the children. The court applied the same rule to that case; holding that the intention of the testator to give both is presumed, unless the other provisions of the will are such as to manifest an intention to put her to an election. In that case the court held that the intent to deprive the widow of dower was apparent—was manifested by the disposition of separate parcels of the real estate to the children.

These cases, I think, so fully establish the rule, in this district, to be in conformity with the decision cited from 5 *Selden*, that I deem it unnecessary to refer to any other cases.

The will in this case is not so clear, as to any intention of the testator, as either of the other cases; for while in those cases the residue of the estate was disposed of immediately, in the present case no disposition is made of the balance of the income after the third is given to the wife. The distribution to the children is not until after the death of the wife, and if the widow is not entitled to dower, two-thirds of the income is to remain undisposed of until her death.

The court upon the trial erred in holding that the devise in the will was in lieu of dower; and a new trial must be ordered; costs to abide the event.

[NEW YORK GENERAL TERM, February 3, 1862. *Ingraham, Leonard and Clarke*, Justices.]

HOSSTATTER *vs.* WILSON.

An instrument by which the maker promises to pay to the order of another a specified sum, at his store, or in goods on demand, for value received, is a negotiable promissory note.

THIS action was brought by the plaintiff as the owner and holder of four several promissory notes, made and signed by the defendant. The following is a copy of one of said notes :

“ \$55. *Williamsburgh, Dec. 20th, 1859.*

Four months after date, I promise to pay to the order of M. W. Wilson, fifty-five dollars, at my store, No. 134 4th street, (or in goods on demand,) value received.

(Signed)

M. W. WILSON.”

Said note being indorsed in blank, “M. W. Wilson” and “Hosstatter & Henssel.” The other notes bore the same date, and were in the same form, but for different amounts, and were all indorsed in blank by M. W. Wilson.

The complaint alleged that neither the plaintiff nor any other holder of said notes, or any of them, ever elected to take payment thereof in goods, as provided therein; that the same are wholly due and unpaid, and that the defendant was justly indebted to the plaintiff thereon, in the amount of \$295, being the aggregate amount of said four notes, together with interest; for which sum the plaintiff demanded judgment. The defendant demurred to the complaint, on the ground that it appeared on the face thereof that it did not state facts sufficient to constitute a cause of action. After argument, at special term, the demurrer was overruled with costs; and the defendant appealed.

*R. H. Huntley*, for the appellant.

*Lawton & Larned*, for the respondent.

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*By the Court*, INGRAHAM, P. J. The notes declared on in this action were promises to pay the amounts therein mentioned as dollars or *in goods on demand*. The complaint merely gives copies of the notes, with an averment that no holder of the notes had ever elected to take payment in goods. The defendant demurred to the complaint, on the ground that there was no cause of action stated therein. The demurrer was overruled. The decision of the questions arising on the demurrer depends upon the question whether the instrument is a promissory note. If it is, then the complaint is sufficient.

The essential requisite of a promissory note is, that it must be payable in money absolutely and without any contingency. Such payment must be precise and certain. (*Chit. on Bills*, 152, 9th ed. *Story on Prom. Notes*, § 22.) So a written promise to pay the bearer a certain sum of money in goods is not a valid promissory note. (*Story*, § 17. 7 *John*. 321. 1 *Cowen*, 691.) If there appears upon the face of the note any contingency which would make it payable in any thing other than money, then it does not possess the negotiable qualities of promissory notes, and becomes a mere contract. It is an alternative agreement to pay a sum of money or do some other act. In the present case the debtor promises to pay in money. He has no election to do any thing else. If the holder chooses, he may surrender the note and receive goods; but that rests entirely with himself, and no choice is left to the debtor.

Upon the argument, my impressions were adverse to the sufficiency of this complaint; but a late case in the court of appeals has, I think, established a contrary doctrine. In *Hodges v. Shuler*, (22 *N. Y. Rep.* 114,) it was held that a note of a corporation, for a specific sum, with a fixed time for payment, and containing the condition that the holder might within a given time surrender the note, and receive stock in lieu thereof, was a promissory note. This was no other than a note for money, or, in case the holder elected



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within the time specified, to be paid in stock. Wright, J. says: "The instrument is a promissory note. It is for the unconditional payment of money, at a specified time, to the payee's order. It was not optional with the makers to pay in money or stock, and thus fulfill their promise in either of two specified ways: in such case the promise would have been in the alternative." And again, "although an election was given to the promisees upon a surrender of the instrument to exchange it for stock, this did not alter its character, or make the promise in the alternative, in the sense in which that word is used respecting promises to pay."

Whatever views I might otherwise entertain, of this question, I think the decision last cited covers this case and controls us in the disposition of this question.

It was said that the averment that no demand had been made for the goods, sustained the grounds taken by the defendant. Upon that point I have no difficulty. The answer to it is, that the averment is unnecessary. The matter was only available as a defense if the demand had been made and complied with. Even if the demand for goods has been made, the debtor would not have been relieved from his obligation to pay in cash, except by delivering the goods demanded. In case of omitting to do so, the obligation to pay remained. If he had paid, the note would have been surrendered.

The judgment of the special term should be affirmed, with costs.

[NEW YORK GENERAL TERM, February 3, 1862. *Ingraham, Clarke and Leonard*, Justices.]

SPAULDING *vs.* STRANG and others.

Where creditors of an insolvent firm entered into an agreement with the latter, by which they covenanted that in case the debtors would execute an assignment of their property to S., preferring therein, as first class creditors, an amount not exceeding \$60,000, and preferring the covenantors to the amount of fifty cents on the dollar on their several claims, they would discharge the debtors from all liability for the balance of such claims; and such assignment was accordingly executed; *Held* that the agreement and assignment were to be construed as constituting parts of one and the same transaction; and that the assignment was on its face fraudulent and void.

An insolvent debtor cannot do, by concealment, what he may not do openly.

Hence he cannot, by a secret bargain with a portion of his creditors, compel them to agree to his release on condition of his executing an assignment giving them preferences.

THIS action was brought by the plaintiff, as a judgment creditor of Alonzo Bradner and Gabriel Furman, to set aside an assignment made by them as copartners, and also assignments made by them individually to the defendant Strang, as assignee, in trust for the benefit of creditors, on the 1st day of December, 1854, on the ground of fraud. This action was commenced on the 22d day of December, 1856, and tried at the special term of this court, in New York, October, 1858, before Hon. JOSIAH SUTHERLAND, justice, who found the following facts, viz: That the plaintiff, on the 29th day of March, 1855, recovered a judgment against Alonzo Bradner and Gabriel Furman, jun., for the sum of \$2937.99, damages and costs, which was duly docketed on that day in the clerk's office of the city and county of New York. That an execution against the property of the defendants therein was subsequently issued on said judgment, to the sheriff of the city and county of New York, where the defendants then resided, which, before the commencement of this action, was returned wholly unsatisfied, and that no part of said judgment has since been paid. That on the 1st day of January, 1854, said Bradner and Furman formed a copartnership as wholesale dry goods merchants in the city of New York, under the firm name of Bradner & Furman, and carried on said

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business in that city as copartners, until on or about the 1st day of December, 1854, when they executed a general assignment of all their copartnership and individual property to Peter O. Strang, one of the above named defendants, as assignee, for the benefit of creditors, which said copartnership assignment was introduced in evidence. This instrument was upon trust to pay, first, certain preferred creditors named in schedule A annexed thereto; and second, "upon the further trust, after fully satisfying the said debts and liabilities, that the said party of the second part shall and will, out of the remainder of the proceeds of the said assigned property, pay to each of the creditors of the said parties of the first part, mentioned in a schedule hereto annexed, marked B, and which is to be taken as a part of this instrument, fifty per cent on the amount of each of their several and separate debts, claims and demands against the said parties of the first part." That the said individual assignments were of the same tenor and effect as that made by said copartnership. That the plaintiff's judgment was recovered on an indebtedness of said firm of Bradner & Furman, which said indebtedness accrued prior to the making of said assignments, and prior to the failure of the firm. That prior to the 16th day of November, 1854, and as early as August in that year, said firm became embarrassed and failed in business, and were unable to pay their debts, and that on that day they entered into an agreement with certain of their creditors, which was introduced and read in evidence by the plaintiff, and was in the words and figures following, to wit:

"In consideration of one dollar to each of us in hand paid by Bradner & Furman, of the city of New York, the receipt whereof is hereby acknowledged, we the undersigned, creditors of the said Bradner & Furman, do severally, and not the one for the other, covenant, promise and agree to and with the said Bradner & Furman, that we will accept and receive from them on or before the 1st day of December, 1854, in full satisfaction of their present indebtedness to us, (due or to

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grow due,) their own paper for the amount of forty cents on the dollar for the several amounts due or to grow due from them, payable in six and twelve months, with satisfactory security; and their own paper for ten cents on the dollar, payable in eighteen months; or in case the said Bradner & Furman shall be unable to do so, then we covenant, promise and agree, to and with them, that in case they shall, on or before the 1st day of December, 1854, make and deliver to Peter O. Strang an assignment of all their property then owned by them, preferring in said assignment as first class creditors an amount not exceeding sixty thousand dollars, and preferring us as second class creditors therein to the amount of fifty (50) cents on the dollar on our several claims, that we shall and will in such case, on the execution and delivery of such assignment, discharge them, the said Bradner & Furman, from all liability for the balance or remainder of our claims against them."

That this agreement was offered to the creditors for execution by Bradner & Furman; that it was signed by the creditors, whose names are subscribed thereto, at the instance and request of Bradner & Furman; and that said Bradner & Furman ratified and became parties to said agreement by accepting the same, and acting thereunder. That said assignments, copartnership and personal, were made and executed and delivered by said Bradner & Furman, and accepted by said Strang, assignee, under and in pursuance of the said agreement of November 16th. That said Strang, as assignee, immediately entered upon the execution of said assignments, and has continued to act thereunder ever since. That he has realized from the assets \$72,377.82. That he has paid out to the first class creditors named in said assignments, and in full of their debts, the sum of \$61,072.42, and that he now holds in his hands, and did at the commencement of this suit, the balance of proceeds, to wit, the sum of \$11,305.40, which is more than sufficient to satisfy the plaintiff's claim herein, and also holds the residue of the property. That the debts

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and liabilities of said Bradner & Furman, when they failed and made said assignments, amounted to about \$194,000. That nearly the whole residue of assets over and above the proceeds already realized are uncollectible and wholly worthless; and that said assignee has realized to nearly the full extent from said assets. That the creditors preferred in the second class, or schedule B, are the same creditors who signed said agreement, and no others. That plaintiff did not sign it. That his claim is not preferred in the first or second class, but that he falls in the third class. That said assignments and agreement constitute parts of one and the same transaction. That nothing has been paid under said assignments to the second class creditors, and that most if not all of said second class debts were purchased after the assignments, by friends or relatives of the assignors, or one of them, at rates from ten to thirty cents on a dollar. That before the commencement of this suit Alonzo Bradner departed this life, leaving Gabriel Furman him surviving, in said copartnership. That there was due the plaintiff, on said judgment recovered by him against said Bradner & Furman, the sum of \$2937.99, with interest thereon from the 29th day of March, 1855. That this action was commenced on the 22d day of December, 1856.

From the foregoing facts the justice found the following conclusions of law: *First.* That the said assignments, and each of them, and said agreement of November 16th, were and are fraudulent and void as to the plaintiff and his said judgment. *Second.* That the plaintiff is entitled to payment of his judgment, and interest thereon from March 29th, 1855, with costs, out of the said trust fund in the hands of the defendant Strang, as assignee, at the date of the commencement of this suit, or that may since have come into his hands. He accordingly directed judgment for the plaintiff against the defendants, that said assignments, and each and all of them, and the said agreement of November 16th, 1854, be declared to be and to have been fraudulent and void, and

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of no effect whatever as to the plaintiff and his said judgment. That said assignments and agreement be set aside and annulled as to the plaintiff and his said judgment ; and that the defendant Peter O. Strang pay the plaintiff said judgment, with interest thereon from 29th March, 1855, with costs, out of the trust fund.

The following reasons were given by the justice for his decision, at the special term.

SUTHERLAND, J. "I think the assignments made, or purporting to have been made, for the benefit of their creditors, by Bradner & Furman, on the 1st day of December, 1854, must be construed in connection with the previous agreement of the 16th of November, between them and certain of their creditors, and that in deciding the question whether the assignments were and are fraudulent and void as to the plaintiff, on their face, the agreement and the assignments must be looked upon as constituting one transaction or instrument. The assignment of the partnership property contains a recital in these words : "Whereas, the said parties of the first part are copartners in trade in the city of New York, under the firm of Bradner & Furman, and are at present unable to pay their debts, *and have agreed* to assign the property hereinafter referred to for the benefit of their creditors, *in the manner hereinafter mentioned.*" The complaint alleges that the assignment which Bradner & Furman respectively made of their individual property contained similar provisions to those contained in the assignment of their partnership property, and was made for a like purpose, and pursuant to the agreement of the 16th of November previous. This allegation is not denied by the answer of the defendants, but is substantially admitted by it. By the agreement of the 16th of November, the creditors who executed it covenanted to and with Bradner & Furman, that in case they should, on or before the 1st day of December, 1854, execute to Peter O. Strang an assignment of all their property, preferring in said

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assignment as first class creditors, an amount not exceeding \$60,000, and preferring them (the creditors who executed the assignment) to the amount of fifty cents on the dollar on their several claims, they would in such case, on the execution and delivery of such assignment, discharge them, the said Bradner & Furman, from all liability for the balance of their claims. The assignments were made to Peter O. Strang on the 1st day of December, 1854. By the assignment of the partnership property, certain creditors, representing about \$53,000 of the debts, were first to be paid in full; the sixty creditors who signed the agreement of the 16th of November, representing about \$93,000 of the debts, were next to be paid 50 per cent, and then, if there was any thing left, it was to be applied in equal proportions, and without preference, towards the payment of all other partnership debts.

It is apparent that the assignments were, in fact, made in pursuance of the agreement of the 16th of November, and that they should be construed together, and should be looked upon as constituting one instrument, for the purpose of seeing whether the law, on the face of the instruments themselves, pronounces the transaction illegal, and fraudulent and void, as to the plaintiff and other creditors who were not preferred, and who declined signing the agreement of the 16th of November.

Strang, the assignee, has realized from the assigned property \$72,377.82, and that is all that probably ever will be realized. The preferred debts of the first class, amounting, with interest thereon, to \$61,072.42, have been paid by the assignee. The rest of the property, and of its proceeds, are in the hands of the assignee. The effect of the transaction, if carried out, would be wholly to deprive the plaintiff and other creditors who did not sign the agreement, and who were first in the third class, of any share or portion of the assigned property, or of its proceeds. By the agreement of the 16th of November, the creditors who signed it, in the first place, severally covenanted to and with Bradner & Furman, *in con-*



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*sideration of one dollar* to each of them *paid by Bradner & Furman*, that they would discharge their debts on receiving, on or before the 1st day of December, 1854, forty cents on the dollar in securities, and the notes of Bradner & Furman for ten cents on the dollar. The creditors then further covenant, "in case the said Bradner & Furman shall be unable to do so," (that is, effect the compromise,) upon the execution of the assignment to Strang, putting them in the second class for fifty per cent of their debts, to release the balance, as above and more at large substantially set forth.

The acceptance of the agreement by Bradner & Furman, although it does not appear to have been signed by them, was in effect a promise or covenant on their part, in case they made an assignment, to make it to Strang, and to put the creditors who had signed it in the second class, and to prefer them over those in the third class, to the amount of fifty cents on the dollar. It is apparent from the papers and from the whole transaction that the consideration which induced this preference was not any supposed equitable nature of the claims of these creditors, or any sense of a moral or honorable obligation, but was the covenant on the part of these creditors to release the balance of their claims. By this transaction these creditors purchased, and Bradner & Furman sold to them, their position in the assignment, and the chance of getting fifty per cent, or at least something on their debts. Surely, the absolute release of their future acquisitions from nearly \$50,000 of debt was an important consideration for the assignors. Surely, if by this arrangement, or transaction, the assignors secured or reserved to themselves the absolute right to this release, they secured or reserved an important benefit for themselves. The manifest intent of Bradner & Furman was to coerce all of their creditors into the terms of the compromise provided for in the agreement of the 16th of November.

It would appear from the instrument itself, and I think it appears from the pleadings and the evidence in this case out-



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side of the instrument, that the compromise was first offered to the creditors, and not proposed by them. The agreement purports to have been executed in consideration of one dollar paid by Bradner & Furman. By presenting this instrument to the creditor, Bradner & Furman in effect said to him, "Sign this, and you will get half your debt; but if you do not sign it, you will of course fall into the third class and get nothing." It is plain to me, from the transaction as shown by the papers, that Bradner & Furman wished to avoid making an assignment by making the proposed compromise with all their creditors. Not being able to get all, except those whom they intended to pay in full, to sign it, they made the assignment.

It appears from evidence in this case, that notwithstanding the assignment, the assignee has never paid any thing to the second class creditors, and that most, if not all, of their claims after the assignments were purchased by friends or relatives of the assignors, or of one of them, at rates from ten to fifty cents on the dollar.

My conclusion is, that the assignment to Strang, when viewed in connection with the previous agreement of the 16th of November, on its face is fraudulent and void as to the plaintiff, and must be declared to be so, upon two grounds: 1st. Upon the ground that the assignors thereby intended to reserve or secure for themselves a benefit. 2d. Upon the ground that the whole proceeding, viewed as one transaction, ~~was an~~ attempt to coerce the creditors to enter into compromise. I think this case comes fairly within the principle decided in *Hyslop v. Clarke*, (14 John. 458;) *Wakeman v. Grover*, (4 Paige, 23; S. C., 11 Wend. 187;) *Armstrong v. Byrne*, (1 Edw. Ch. 79;) *Lentilhon v. Moffat*, (*Id.* 451;) and *Mills v. Levy*, (2 *id.* 183.)

An insolvent has a right to make an assignment for the benefit of his creditors, with preferences. In this case Bradner & Furman had a right to prefer the second class creditors to the third, but they had no right to enter into a *bargain*

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with the second class to give them such preference, and carry it out under color of an assignment for the benefit of their creditors, for their own benefit, to the injury of the plaintiff and other creditors not parties to the *bargain*. The plaintiff is entitled to a judgment declaring the assignment and the whole transaction void, as to him and other creditors who were not preferred, and did not sign the agreement of the 16th of November; and that he is entitled to be paid the amount of his judgment, with interest thereon, and the costs of this action, out of the assigned property, or the proceeds thereof, remaining in the hands of the assignee after the payment of the first class creditors in full, at the time of the commencement of this action.

It appearing, by answer of the defendants, that there remained in the hands of the assignee, after having paid the creditors of the first class in full, of the proceeds of the assigned property, more than sufficient to pay the plaintiff's claim, with costs, my impression is, that the assignee should be directed to pay the same out of such funds, without any reference to take an account of the assigned property, and the proceeds thereof. This question, and all other questions, is reserved, however, until the settlement of the decree, which must be settled on two days' notice.

As this action is for the benefit of the plaintiff alone, as a judgment and execution creditor, and not for the benefit of himself and other creditors in the like situation, if the assignee has sufficient of the trust funds in his hands to pay the plaintiff's claim, after having paid the first class creditors in full, I see no necessity either for a receiver or for a reference to take an account."

From the judgment entered at the special term, the defendants appealed.

*John S. Jenness*, for the appellants.

*J. S. Torrance*, for the respondents.

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*By the Court*, INGRAHAM, P. J. The justice who tried this case has found that the assignments and agreement are one, constituting parts of one and the same transaction. That the creditors named in the second class are the same who signed the agreement, and no others are included therein. And that in consequence of the terms contained in the agreement, the assignments are void.

It was conceded on the argument, as the law of this state, that an assignment containing on its face a provision for the release of the debtor by the creditors who are preferred, is void. I see no difference in the application of this rule to a case where, by a secret agreement, the same condition is imposed upon a creditor. It would not be a creditable administration of justice to hold that an insolvent debtor may do by concealment what he may not do openly, and that he may, by a separate agreement which he conceals, compel his creditors to agree to his release on condition of his executing the assignment, which he could not do if the same agreement was inserted in the assignment.

The finding of the judge, therefore, that these two instruments are but one transaction, is conclusive as to this question. If they were but one transaction, then the assignment and the agreement to release are to be construed in the same way as if the agreement was incorporated in the other instrument.

The cases referred to by the counsel for the appellant are cases referring to the issuing of attachments, which hold that a mere threat to make an assignment if the creditor sues or does some other act, are not sufficient to warrant the issuing of an attachment, but they cannot be used to sustain the doctrine that a debtor may, by a secret agreement with creditors to release him if they are preferred, sustain an assignment giving such preferences.

The question put to the witness Furman was properly excluded. It asked not only for his own intent, but also for that of his partners. Had his own intent, merely, been

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the subject of inquiry it would have been admissible, under the decision in *Seymour v. Wilson*, (14 N. Y. Rep. 567,) but he could not testify as to the intent of his partners. Even if admissible, it would be immaterial, because the facts here, of themselves, render the assignments void, irrespective of the intent of the parties.

The judgment should be affirmed.

[NEW YORK GENERAL TERM, February 8, 1862. *Ingraham, Leonard and Clerke*, Justices.]

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GANS and others vs. FRANK and others.

The rule as to contracts is that the *lex loci contractus* governs, as to the nature, validity, construction and effect of the contract, and the *lex fori* as to the remedy.

The application of this rule will dispose of any defense arising upon a statute of limitations of a foreign state, where such statute only prohibits the bringing of an action after the time limited, in such state. The statute has no effect out of the state, and is not violated by bringing an action in another state or country.

Where the judge found that the defendant passed through this state more than six years before commencement of the action, but was only here temporarily, and that all the defendants had resided in Pennsylvania since the cause of action accrued; *Held* that the action was not barred by our statute of limitations.

If the debtor comes into this state before process is served on him, and he leaves the state, to reside elsewhere, the statute is not a bar until, after deducting all the time of residing abroad, the debtor has been in this state for six years.

Whether the absence is repeated, or is one continued absence, is immaterial. There must be full six years spent in this state, to make our statute of limitations a bar

**A**PPEAL from a judgment entered at the circuit, after a trial before the court without a jury.

The complaint was for goods sold and delivered to the defendants by a firm of which the plaintiffs are the surviving

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partners. The answer set up as a first defense, that the cause of action did not accrue within six years before the commencement of this action; as a second defense, a defect of parties plaintiff; that the personal representatives of Joseph Schôneman, the deceased partner, were partners with the plaintiff at the time of the sale, and were not made parties hereto; and as a third defense, that at the time of the sale, and for six years after the debt accrued, the parties hereto resided in Pennsylvania, where the sale was made; that by the laws of that state, no action on book account can be brought after six years after the debt has accrued, and also that when the cause of action accrued, the defendant N. Frank was not a resident of this state, or within it; that he afterwards returned into this state, and that this action was not commenced within six years after such return.

The action was tried at the New York circuit. The justice who tried the same, found the following facts: That the goods and merchandise were sold at the time, and for the prices alleged in the complaint, by the firm of Schôneman, Gans & Co., to the defendants; that the defendants received the same, and promised to pay therefor to said firm the said sum, at the times alleged in the complaint; that after the sales, and before the commencement of this action, Joseph Schôneman, one of the firm of Schôneman, Gans & Co., died, leaving the plaintiffs his survivors; that no part of said money has been paid; that the goods were sold and delivered to the defendants more than six years previous to the commencement of this action, in the state of Pennsylvania, where the members of said firm of Schôneman, Gans & Co. and where said defendants resided, and that all of said parties have ever since resided in said state, except said Schôneman, deceased, and that none of the plaintiffs or the defendants have ever resided in this state or carried on business here; that by the laws of said state of Pennsylvania, no action can be commenced therein after six years after the maturity of a debt due on book account; and he further found that the defend-

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ant N. Frank passed through this state more than six years before the commencement of this action, and after said account was due, but was only here temporarily.

And as matter of law, he found that this action was barred by the statute of limitations of said state of Pennsylvania, and that the defendants were entitled to a judgment of dismissal, with costs.

Judgment of dismissal being entered, the plaintiffs appealed.

*Birney & Prentiss*, for the appellants.

*Mott, Murray & Harris*, for the defendants.

*By the Court*, INGRAHAM, P. J. The facts found in this case were these: a sale of goods by the plaintiffs to the defendant; that the sale was more than six years previous to the commencement of the action; that all of the parties, then and ever since, resided in Pennsylvania, except one, who is deceased; that by the laws of the state, no action can be commenced, in Pennsylvania, after six years after the maturity of the debt due, on book accounts; and that the defendant N. Frank passed through this state more than six years before the commencement of this action. The defense was the statute of limitations, and the judge found the debt was barred by the statute of Pennsylvania.

So far as relates to the statute of limitations of the state of Pennsylvania, I am of the opinion that the statute is not a bar. The respondents do not rely on it as such, in their points. The rule as to contracts is that the *lex loci contractus* governs as to the nature, validity, construction and effect of the contract, and the *lex fori* as to the remedy. The application of this rule disposes of any defense arising upon a statute of limitations of a foreign state, where such statute only prohibits the bringing of an action after the time limited in such state. The statute has no effect out of the state, and is not violated by bringing an action in another state or

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country. If the provisions of the law rendered the contract void, or terminated it in any way, a different rule might be applicable.

This question was before the court in *Lincoln v. Battelle*, (6 *Wend.* 475.) Ch. J. Savage says, at page 485, "It is well settled that a statute of limitations affects only the remedy, and not the validity of the contract." He also adds, Mr. Justice Story, after saying if the question was new he would adopt a different rule, "admits the law to be otherwise, and decided that a plea of the statute of limitations of the state where the contract is made is no bar to a suit brought in a foreign tribunal to enforce the contract."

The other question is whether the action is barred by the statute of this state. The finding is that the defendant N. Frank passed through the state more than six years before the commencement of the action, but was only here temporarily, and that all the defendants have resided in Pennsylvania since the cause of action accrued. These facts show that the statute had not barred the action.

If the defendant Frank had not come into the state before the time when process was served upon him, the statute provided that the limitation should commence from that time. Or, if he came before, and left the state, to reside elsewhere, then the statute is not a bar until, after deducting all the time of residing abroad, the debtor has been in the state for six years. Whether the absence is repeated, or is one continued absence, is immaterial. Under the decisions, there must be full six years spent in the state to make the statute a bar. (*Berrien v. Wright*, 26 *Barb.* 208. *Wheeler v. Webster*, 1 *E. D. Smith*, 1. *Harden v. Palmer*, 2 *id.* 172.)

The defendant was not in the state when the cause of action accrued. He never resided here. The statute did not commence to run until the defendant came into the state. That was the time of his passing through the state. As that was temporary, and he continued to reside in Pennsylvania,

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there is no evidence to sustain a finding that the statute was a bar.

In either view of the case, I think the exception to the decision of the court was well taken. A new trial must be ordered; costs to abide the event.

[NEW YORK GENERAL TERM, February 8, 1862. *Ingraham, Leonard and Clarke, Justices.*]

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CALLANAN & INGHAM vs. VAN VLECK and others.

Under ordinary circumstances, an authority given by a partnership firm, to its agent, to advance moneys for the purchase of notes or bills to be remitted to the firm, will not justify the agent in continuing to make such advances, after being notified of a change in the firm, by the admission of new partners. There must be a renewed authorization by the new firm.

But if the bills so purchased by the agent, after notice of the change in the firm, have been remitted to the firm, received and receipted by the new members, retained by them, and used and applied in their business, this will justify the agent in inferring that the authority previously given by the old firm was continued by the consent of the new one; and is sufficient to render the new firm liable for the amount of such advances.

**A**PPEAL from a judgment entered upon the report of a referee. The only point in controversy was whether the defendants, under the facts of the case, were entitled to charge against the firm of A. J. Stevens & Co., of which the plaintiffs were the partners and are the assignees, the sum of \$6400, expended for the purchase of the notes or bills of the Agricultural Bank of Tennessee, and by them remitted to said firm. The facts in regard to the transaction are these: Prior to June 1st, 1857, Andrew J. Stevens was engaged in business of banking, at Fort Des Moines, Iowa, under the name of A. J. Stevens & Co., and opened a bank account in such name with the defendants' house at New York. Stevens in fact, at that time, had no partners, but of this the defendants were ignorant. On the 27th of April, 1857, the



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defendants received from A. J. Stevens & Co. a letter of that date directing the defendants to pay John Thompson for such packages of the Agricultural Bank of Tennessee, as he might hand them, and forward the same to A. J. Stevens & Co. at Fort Des Moines aforesaid, and charge the same to them. These instructions were never countermanded, and the defendants immediately began to act under them, and continued so to act until the close of the accounts between the two firms, in August, 1857. On the 1st of June, 1857, the plaintiffs, Callanan & Ingham, were admitted as partners in the said firm of A. J. Stevens & Co., and a letter announcing that fact was sent by the said firm of A. J. Stevens & Co. which contained the signatures of Stevens and of Ingham, and requested the defendants to render a careful statement of "our account" to that date, and stating that "our drafts" would be signed thus and so, and signed in the firm name of A. J. Stevens & Co. This letter and all others thereafter written in the business of A. J. Stevens & Co. to the defendants, were written on sheets of paper containing the same printed bill-heads used by the firm prior to that time. The defendants continued to purchase and remit the bank bills of the Agricultural Bank, in the same manner previously adopted by them, and all these bills were directed to A. J. Stevens & Co., and received by that firm, and used in its business. All the packages of bills were, in fact, received by the plaintiff Ingham, and receipted by him in the name of the firm of A. J. Stevens & Co., who had the avails of said packages, and used the same in their business, paying them out in the ordinary way to their customers. After the plaintiffs were admitted into the said firm, no change was made in the title or manner of keeping the account between the firm of A. J. Stevens & Co. and the defendants, but on the contrary, one continuous account between the two firms was kept, from its commencement in October, 1856, to its close, in September, 1857, and the balances of debt or credit in each monthly account were carried into the next succeeding

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account. In the said account, remittances to the defendants were credited when received, and drafts drawn upon the defendants were charged when paid, and the several drafts drawn were in all cases numbered; and the number of the drafts of the firm, after the admission of the plaintiffs as partners, followed consecutively, in regular order, those used by the firm previous to that time; and many drafts drawn previous to that time were not charged until a long time afterwards. When the plaintiffs came into the firm there was no closing or winding up of its old business, but the same was continued and kept on in the same way in which it had been conducted; the same office was occupied, the same clerks engaged, the same books used, and the same letter and bill-heads adopted; and instead of closing the old account, the plaintiffs purchased of Stevens an interest in the balance due from the defendants, and such balance was debited to the defendants and credited to Stevens. It appeared that when the first package was received by Ingham, he asked his co-partner Stevens about it, who told him to take the money and use it in the business of the firm, and give him credit for it; and that the plaintiffs did so. It appeared, also, that the defendants had acted throughout in good faith, relying on the instructions contained in the letter of April 27, 1857, and on the belief that the new partners ratified and acquiesced in the said arrangement.

The complaint alleged that on and about the 25th of August, 1857, the defendants received, on different days, large sums of money, subject to the order of A. J. Stevens & Co. That at the last day the defendants so held on deposit \$10,136.89. That on that day A. J. Stevens & Co. directed the defendants to transfer all sums due to them over to the plaintiffs, under the firm name of Callanan & Ingham, but the defendants only transferred, under such directions, \$3736.89, leaving a balance in their hands of \$6400, which sum belongs to the plaintiffs, Stevens having for value received transferred the claim to the plaintiffs, and which sum

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the defendants had refused, on request, to pay to the plaintiffs. That the pretense for retaining the same made by the defendants was, that they had paid out the balance claimed, to redeem the bills of the Agricultural Bank of Tennessee, and that such redemptions were made by the authority of A. J. Stevens & Co.; but the plaintiffs averred that such redemptions were made without the authority, order or sanction of A. J. Stevens & Co. By the pleadings, the issue presented was confined to the single question of authority to pay out that sum to redeem the notes of the Agricultural Bank of Tennessee. On the trial a stipulation, signed by the attorneys for the respective parties, agreeing on the principal facts, was given in evidence, by which this single question was made the turning point in the case.

The referee reported, as a conclusion of law from the facts found by him, that the plaintiffs had no cause of action against the defendants, and that the defendants were entitled to judgment.

The plaintiffs appealed. ✓

*L. Tremain*, for the appellants.

*John E. Burrill, Jr.* for the respondents.

CLERKE, J. The only question here is, whether the defendants were justified in continuing to make the appropriations after the formation of the new firm, which Stevens had authorized them to make some time before, when he was the only member of the firm of A. J. Stevens & Co.

Under ordinary circumstances, the authority thus given by Stevens would not be sufficient to justify the defendants in continuing these appropriations, without a renewed authorization by the new firm. It would have been the duty of the defendants, on being informed of the change in the concern, to inquire of the new firm whether they should continue to do what Stevens alone had previously directed them

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to do. But the referee finds that Ingham, one of the new members, received the packages; that he receipted them to the express company, in his own handwriting, in the name of the firm; and that the avails of the packages were used by the new concern, who used them in their business, paying them in the ordinary way to their customers. To be sure, neither of the new members had any knowledge, prior to the receipt of the monthly account from the defendants in August, that there had been any arrangement made with Stevens, authorizing the defendants to pay Thompson for the packages; and Ingham supposed, when he received them, that they came directly from Thompson, and that they belonged to Stevens. This induced the new firm to make allowances, and to give credit to Stevens, which they otherwise would not have done; and for these advances they have never been reimbursed. But still, as we have seen, the new firm actually obtained the packages, receipted them in the handwriting of Ingham, one of the new members, retained them, and used them in their business. This was sufficient to induce the defendants to believe that the authority previously given by Stevens alone, was continued by the consent of the new firm.

The plaintiffs, therefore, are liable for those advances, not merely by virtue of the authority given in April, 1857, by Stevens, but because they were made for the benefit and by the implied authority of the new firm.

The judgment should be affirmed with costs

LEONARD, J. The fact that the new firm had the money sent by the defendants, is alone sufficient to charge them. I concur.

INGRAHAM, J. also concurred.

Judgment affirmed.

[NEW YORK GENERAL TERM, February 8, 1862. *Ingraham, Leonard and Clarke, Justices.*]

LORING vs. THE UNITED STATES VULCANIZED GUTTA PERCHA BELTING AND PACKING CO. and JOHN O. SARGENT.

Where a corporation formed under the act of February 17, 1848, made an assignment of all its property in trust for the benefit of creditors, *pro rata*, such assignment being made in contemplation of insolvency; *Held* that such assignment was void, notwithstanding it provided for an equal distribution of the assets of the corporation among all its creditors.

THIS action was brought by the plaintiffs as judgment creditors of the United States Vulcanized Gutta Percha Belting and Packing Company, a corporation formed under the act passed on the 17th day of February, in 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," and the acts amending the same, for the purpose of setting aside an assignment made by the said company, on the 24th day of December, 1858, to the defendant Sargent, in trust for the benefit of its creditors. The assignment recited the insolvency of the company, and was upon the following trust:

"In trust, nevertheless, and to and for the following uses, intents and purposes, that is to say—that the said party of the second part shall take possession of all and singular the property and estate hereby assigned, and sell and dispose of the same, and convert the same into cash, and shall also collect all and singular the said debts, dues, bills, bonds, notes, accounts, claims, demands and choses in action, or so much thereof as may prove collectible, and by and with the proceeds of such sales and collection the said party of the second part, after paying the just and lawful expenses, costs, charges and commissions of executing and carrying into effect this assignment, shall pay and discharge all the debts and liabilities of the said party of the first part now existing, whether due or hereafter to become due, without preference, provided there shall be sufficient for that purpose. And if said proceeds shall be insufficient for that purpose, then to pay and apply the same, *pro rata*, to the payment of said debts and

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liabilities, according to their respective amounts. And if there shall be any surplus after payment of all of said debts and liabilities, to return the same to the party of the first part, or its legal representatives."

The court, at special term, held that the assignment was fraudulent and void as against creditors, and ordered a reference to a referee, to appoint a receiver. The defendants appealed.

*E. Sprout*, for the appellant.

*B. Roelker*, for the respondent.

*By the Court*, CLERKE, P. J. Upon the evidence, the justice at special term found, that the defendant was a corporation formed under the act of February 17, 1848; that it had made an assignment of all its property to John O. Sargent, defendant, for the benefit of all its creditors, *pro rata*, as set forth in the complaint; that the assignment was made in contemplation of insolvency; and that judgments were recovered against the corporation, and executions issued thereon, as set forth in the complaint.

We see no reason whatever for disturbing these conclusions, from the evidence. The assignment, then, although made in contemplation of insolvency, is it excluded from the operation of the statute, declaring such assignments void, merely because it provides for an equal distribution of the assets of the corporation among all its creditors? It is contended that the only object of the prohibition is to secure this equal distribution; and if the assignment secures this, it could not have been contemplated by the legislature to be within the purview of the enactment. But this is mere speculation. Even if we were to take for granted that the legislature had no other object in view, yet this would not warrant us in ignoring the express provisions of a prohibitory enactment. It is always safe to assume, if the law

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makers intended to make any exceptions, that they would expressly mention or refer to such exceptions. They have done nothing of the kind in the enactment under consideration; and the fact that it requires ingenious reasoning to make such a position not glaringly absurd, convinces me it would be very improper to suppose that the exception contended for in this case was contemplated or intended.

Neither are we to presume that the sole object of the statute was to secure this equal distribution among the creditors. It may have had, and probably had, another object in view. We are warranted in supposing that it was also designed to prevent an insolvent corporation from putting its property into the hands of an assignee chosen by its officers or trustees, instead of having it placed in the custody and under the control of a receiver appointed by the court. The legislature perhaps deemed such a disposition of it as subjected it more directly to judicial supervision more advantageous to the creditors than if it were committed to a person who may not be as disinterested, or as competent, as a receiver appointed by the court after hearing all parties concerned, in relation to the appointment. This would be in conformity with a well known maxim, "*Fortior est custodia legis quam hominis.*"

The special term, therefore, was correct in declaring the assignment void. But we think the provision of the decree directing the payment of the plaintiff's judgment out of the assets of the company, is erroneous. It gives that very preference which the statute is so careful to avoid. Other provisions of the revised statutes—those relative to proceedings against corporations in equity—(2 R. S. 462, §§ 36, 37,) declare whenever a judgment or decree shall be obtained against any corporation, and an execution issued thereon shall have been returned unsatisfied, the court may sequester the property, and may appoint a receiver, and upon a final decree the court shall cause a just and fair distribution of the property to be made among the creditors, who shall

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be paid in the same order as in the case of a voluntary dissolution of a corporation. (2 R. S. 470, § 79, *marginal*.) Our whole legislation on this subject carefully guards against any preferences, except those mentioned in the section last referred to. The jurisdiction of the court, therefore, in cases of this kind, should not be exercised in conformity with its general inherent equity powers, but in harmony with those provisions, even when the proceedings are not identical with the precise remedy or procedure on which those provisions are based.

That part of the decree requiring the assignee to pay the receiver \$1500, is manifestly erroneous. The receiver of the assets of the company, already appointed, is directed to proceed according to the provisions of the revised statutes, in collecting the assets. The defendant Sargent should also account and pay over to the receiver any balance remaining in his hands of the \$1300 received by him.

The order to be settled on two days' notice.

[NEW YORK GENERAL TERM, February 8, 1862. *Ingraham, Barnard and Clarke, Justices.*]

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THE BANK OF THE STATE OF NEW YORK vs. THE FARMERS' BRANCH OF THE STATE BANK OF OHIO.

The cashier of a bank has no power to make a contract for the bank, in his own name, unless the corporation has authorized him to do so, on its behalf, and with the intention that it should be bound.

Accordingly, where a cashier, though authorized to indorse, for the purpose of transmitting to other banks for collection, bills and notes deposited with his bank or discounted by it, had no special authority to affix his name, or that of the bank, for the purpose of making the corporation liable on a contract of indorsement, but in order to facilitate the collection of a bill he indorsed the same as follows: "Pay E. Ludlow, Cas. or order; P. S. Campbell, Cas." *Held* that the bank was not made liable as indorser of the bill.



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THIS action was brought by the plaintiff, claiming to be the holder of a bill of exchange, against the defendant, as indorser. The answer denied that the defendant made any contract of indorsement upon the bill, but admitted that "the defendant's cashier, P. S. Campbell, for the sole purpose of facilitating its collection, wrote on the back thereof as follows: 'Pay E. Ludlow, Cas. or order; P. S. Campbell, Cas.' and transmitted the same to the defendant's agent, the Ohio Life Insurance and Trust Company at the city of New York, for collection only, and remittance of the proceeds thereof to the defendant, the said trust company not being authorized by the defendant to sell, pledge, or in any manner dispose of or use the said bill, except in collecting the sum secured thereby for the use of, and for remittance to, the defendant as aforesaid."

On the trial the complaint was dismissed, and the plaintiff appealed.

*A. W. Olason*, for the appellant.

*E. Pierrepont*, for the defendant.

*By the Court*, CLERKE, P. J. Assuming that the plaintiffs are *bona fide* holders of the bill in question, are they entitled to recover? The solution of this question depends upon the effect of the indorsement made by the defendant's cashier. The name of the defendant's corporation does not appear any where on the paper. The bill was indorsed "Pay E. Ludlow, Cas. or order," signed "P. S. Campbell, Cas." It is not disputed that Campbell was the cashier of the defendant, and that he was authorized to indorse, for the purpose of transmitting to other banks for collection, bills and notes deposited with the defendant or discounted by it. But it nowhere appears that the cashier was authorized to affix his name, or that of the bank, for the purpose of making the bank liable on a contract of indorsement. The general rule,

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undoubtedly, is that in order to bind the principal, the agent must contract in the name of the principal, and not his own. As Judge Denio says, in *The Bank of Genesee v. The Patchin Bank*, (3 Kernan, 318,) in most of the cases varying from this principle, if not in all, though the engagement purported to be that of the person signing as agent, the name of the principal appeared in some part of the instrument; and that circumstance is particularly mentioned as essential. In *The Bank of Genesee v. The Patchin Bank*, that feature was wanting, as in the case before us. But the judge was of opinion that the Patchin Bank should be held liable as indorser upon a different ground—that of allowing the indorsement to be filled up according to the intention of the parties; and he cites several cases in which the right to do this was recognized. The whole amount of that decision, on the point in question, is, that where the cashier of a banking corporation is authorized to indorse paper on its behalf, and with the intention of binding the corporation he writes his name, "A. B., cash." on the paper, the holder is authorized to write the name of the corporation over the signature of the cashier, with proper words to make the indorsement in form a contract in the name and behalf of the corporation. In the case before us, nothing of the kind is shown; but, on the contrary, it is distinctly averred in the answer, that the cashier put his name on the bill for the sole purpose of facilitating collection; and that he transmitted the same to the bank's agent in the city of New York, for collection only. The plaintiff claims to recover solely on the ground that the name of the cashier appears on the bill, without proceeding to show that the indorsement was made in behalf the defendant, with the intention of binding it.

This conclusion does not in the slightest degree conflict with the decision in *The Farmers and Mechanics' Bank v. The Butchers and Drovers' Bank*, (16 N. Y. Rep. 125.) In that case the teller was authorized to certify checks; and it was held that, as he was authorized to make this representa-

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tion of a fact, the bank was bound by his representations, even when he made a mistake. This was placed on the doctrine of *estoppel*; but it surely does not recognize the right of even the duly authorized officer of the bank to make a contract for it in his name, without showing that it authorized him to do so on its behalf, and with the intention that the bank should be bound.

The judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, February 8, 1862. *Ingraham, Leonard and Clarke, Justices.*]

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SLOAN & SCHWARTZ *vs.* VAN WYCK and others

G., being the owner of a patent right for the cities of New York and Brooklyn, and some tools, on premises leased by him, employed the plaintiffs to construct a planing machine, for him, to enable him to effectuate his interest in the patent right. He then sold his interest in the lease of the premises, with the tools and machines, and in the patent right, to V. Before the plaintiffs had commenced work upon the planing machine, G., accompanied by V., called on them and informed them that he (G.) had sold out his interest to V., who assented to the statement. The plaintiffs then proceeded with the machine, and completed it, and delivered the same to V. and charged him with the price. *Held* that V. could only be made liable upon the ground of an original promise; but that if he expressly or impliedly directed the plaintiffs to complete the machine, and the same was completed and delivered to him, he was bound to pay therefor.

*Held, also*, that a subsequent taking back of the machine, by the plaintiffs, would not prevent a recovery by them, where it appeared that they merely took it back for the purpose of making a sale thereof on account of V., without intending to discharge his liability.

THE complaint in this action alleged that the plaintiffs were copartners in the business of manufacturing machinery, in the city of New York, under the firm and name of Sloan & Schwartz, and were copartners in that business on and before the first day of November, 1850; that as such partners, the defendants, Theodore M. Hall, Roswell Green

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and Pierre C. Van Wyck, were indebted to them on the 28th of March, 1851, in the sum of \$3014.41, and interest thereon from and after the 28th day of March, A. D. 1851, beyond any credit or discount for the work and labor done and performed for the said defendants, and at their request, and for materials furnished for them prior to and including the said 28th of March, A. D. 1851. That the defendants Green and Hall, as the plaintiffs were informed by said Hall on or about November 1st, 1850, were anxious to have a machine built for the purpose of planing boards and plank, and tongueing and grooving the same, and he stated that he was a partner of said Green in the patent of said machine for the city of New York, and in the building of said machine; that they had a right to use the patent, which is known as "Kittle's Patent Floor Dressing Machine;" that the same was a new invention, and that they wished the plaintiffs to make the patterns for the machine, the castings and the machinery, and he applied to them for that purpose; that the plaintiffs agreed to go on and make said patterns, castings and machinery; that the said Hall and Green on their part agreed to pay the plaintiffs, as the work should progress, about one-half in cash, and upon the finishing the said machine, the whole amount should be paid in cash on the delivery of said machine; that the plaintiffs continued to work according to said request in the making the patterns, castings and machinery, until the same was duly finished, under the direction of the said Hall, or Green, or Van Wyck, one or all of them, or their agent, and superintending the building of said machine for them, or one of them, with the knowledge of the others. That the defendant Green sold out a portion of his interest in the said patent, castings and machine, to the defendant Van Wyck, some time in November, A. D. 1850, and that said Van Wyck thus became interested in the patent, and in the patterns, castings and machine, and in the building thereof, and he gave orders in relation thereto and in relation to other machinery connected with the same par-

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ties. And the plaintiffs further stated that they frequently applied to one, some or all of the defendants, for payment on account of the said work upon the patterns, castings and machine, and for the materials furnished; that the only money received for said work and materials done or furnished for said patterns, castings and machine, in pursuance of such orders, was the sum of \$250, paid in the name of Hall and Van Wyck, two of the defendants, and that said sum is credited upon the bill for work, and that the first sum herein mentioned is exclusive of this said sum of \$250. That the machine was furnished and put up under the care, direction and superintendence of the defendants, or some one of them, or of some person or persons acting for each and all of the defendants, or some one of them, and so completed on the 28th day of March, 1851, when the entire amount of money should have been paid according to said agreement; that the agent of the defendants, or a person acting in that capacity, or in some way interested in said machine, promised to come and pay the plaintiffs \$1000, a portion of the said money, on the day the machine was taken away, as hereinafter mentioned; and the defendants often spoke of the payment of the money for the machine as being ready, and that upon such promises and assurances, and only such, the plaintiffs allowed the machine to be taken to No. 71 Twenty-second street, to be put up for trying the same, and only upon such terms and agreements did the plaintiffs consent that the said machine should be put up; that the plaintiffs put up the said machine; that the said Green and Van Wyck were present many times when the machine was being put up, and made an appointment with the plaintiffs to meet them within a few days after the machine was put up, to pay the plaintiffs, but the said defendants did not meet the plaintiffs as they agreed to do; that they worked the machine and found no fault with it. That said machine was set up for show and exhibition, at No. 71 Twenty-second street, in the city

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of New York ; that the defendants, not paying them for said work, labor and machine, the plaintiffs, after giving one or more of the defendants notice thereof, had taken said machine down, and now have the same in their possession ; that they have tendered the said machine to the defendants and demanded payment for the same, and that they are now ready and willing to deliver the said machine to the defendants upon being paid therefor, and for the work done in relation thereto, at the request of one or all of the defendants, or their agent ; that the same is a valuable machine for the planing of boards, but that the patent is held by all or some of the defendants, or a portion of said patent is held by some one or all of said defendants.

The plaintiffs, together with other relief, prayed judgment against each and all of the defendants, and such others as might be discovered, as should be just and proper, and for the sum of \$3000.41, and interest from the 28th day of March, A. D. 1851, and the costs of this action.

The defendant Van Wyck alone appeared. He put in an answer denying the material allegations of the complaint, and alleging that he did not order said machine, or give any orders relating thereto, or become responsible to the plaintiffs to pay for the same in any way, or upon any terms or conditions whatever, nor had he at any time ever held any interest in said machine of any kind, either by purchase or otherwise, nor did he ever become liable to the plaintiffs in any way for any alleged work, labor, materials or machinery, in any manner connected with said machine. That said machine was not worth the amount claimed in the complaint, but, on the contrary thereof, the said machine was wholly and entirely valueless, for the purposes for which it was built, and of no practical use whatever. That said machine was built for planing, tongueing and grooving boards, but the same, in those respects, proved a perfect failure after being fully tried, and wholly unfit and of no value for any such

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purpose; that at the time of the commencement of this action the plaintiffs held said machine and machinery, and every thing connected therewith, in their possession and as their property, and some time in the year 1852 sold the same as their property, and on their own account, for a large sum of money, to wit, about \$1300, and received said sum in payment, and if there is any portion of said machine, machinery or patterns unsold, they yet retain the same in their possession and as their property. And the defendant alleged that the plaintiff never tendered said machine or machinery, or any part thereof, to him, or claimed that he was liable therefor, before the commencement of this action. That the plaintiffs were fully paid and satisfied, before the commencement of this action, for all claims and demands they had against the defendant, and he was fully released and discharged therefrom.

Wherefore the defendant demanded that the complaint be dismissed, and that he have judgment against the plaintiffs, with costs.

The action was tried before a jury, who found a verdict in favor of the plaintiffs, and from the judgment entered thereon, and from an order made at a special term denying a motion for a new trial, the defendant Van Wyck appealed.

*Charles N. Black*, for the appellant.

*C. Bainbridge Smith*, for the plaintiffs.

*By the Court*, CLERKE, P. J. If Van Wyck is liable at all, it is on the ground of an original promise. The machine, for the making of which this action is brought, was ordered in the first instance by Green, who was the owner of a Kittle's machine, and some tools which he had, on premises rented by him in 22d street. This machine was ordered, to enable him to effectuate the interest which he had in the

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patent right in that machine for the cities of New York and Brooklyn. After the machine was ordered, Green sold to Van Wyck his interest in the lease of the building in 22d street, with the tools and machines therein, and also his interest in the patent right in Kittle's invention. This was on the 17th of November, 1850. Before the commencement of the work, according to the testimony of Schwartz, Green called on him, accompanied by Van Wyck, and stated that he had sold out his interest to Van Wyck, who assented to the statement. After this, the plaintiff proceeded with the machine and completed it.

Although the machine was, in the first instance, ordered by Green, yet if Van Wyck expressly or impliedly directed the plaintiffs to complete it, and if they delivered it to Van Wyck, the latter is liable to pay for the work; and the plaintiffs having chosen to charge Van Wyck, and having delivered it to him, had no claim against Green.

The questions of fact, upon which these propositions depend, were fairly put to the jury; and I see nothing, in this respect, in the judge's charge, of which the defendant can complain.

The complaint contains a great deal of unnecessary matter; but, however inconsistent with the general allegations some of the statements, which are mere recitals of evidence, may be, yet those general allegations contain enough to sustain a claim for work and labor; and the judge properly refused to dismiss the complaint on the ground that it did not show an original promise.

As to the taking back of the machine by the plaintiffs, after it was delivered to Van Wyck, the judge expressly charged the jury "if the plaintiffs intended to take the machine as a substitute for his debt, and to relieve the defendant from all liability, then they could not claim for it in this suit; but if they merely took it for the purpose of making a sale on account of Van Wyck, then it was not a circumstance



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which prevents their recovering." This question could not be left to the jury in clearer terms.

On the whole, I see no reason why the verdict should be disturbed.

The judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, February 8, 1862. *Ingraham, Leonard and Clarke, Justices.*]

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THE PEOPLE, *ex rel.* James S. Brownson and others, *vs.* THE MARINE COURT OF THE CITY OF NEW YORK and others.

THE SAME *vs.* THE SAME.

THE SAME *vs.* THE SAME.

The writ of prohibition does not issue to correct errors or irregularities in administering justice by inferior courts, but to prevent courts from going beyond their jurisdiction in the exercise of judicial power in matters over which they have no cognizance.

It ought not to issue where the party has a complete remedy in some other and more ordinary form.

The writ will not be issued upon the ground that the affidavits on which proceedings by attachment were founded did not show certain matters which were necessary, to justify the issuing of the attachment.

Nor will it be issued on the ground that the debt for which the plaintiff was entitled to sue, in the court below, was larger than the jurisdiction of that court permitted to be recovered there; provided the plaintiff, to obviate that difficulty, remits all beyond the amount of which the court has jurisdiction.

**A** PPEAL from an order made at a special term, denying an absolute writ of prohibition. Actions were commenced by Samuel W. Slocum in the marine court of the city of New York, against James S. Brownson, Frank P. Slocum and Edward Hopkins, by attachment, upon three several promissory notes made by the defendants for \$600, \$650 and \$600, respectively. The complaint in each case was the usual complaint upon a promissory note. The defendants put in an

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answer, in each case, in which they claimed and insisted that the action ought not to be maintained against them: "*First*. Because the same was begun by attachment issued on the 9th day of September instant, which attachment was founded on an affidavit sworn to by the plaintiff on said day, and that there are not, as they are advised and believe, facts sufficient stated in the said affidavit to give this court jurisdiction thereof. *Second*. Because the action was commenced by the attachment of property, the alleged debt exceeding \$500. *Third*. Because there is another action pending in this court for a part of the entire cause of action of which the matters stated in the complaint herein form a part. *Fourth*. And for a further defense, the defendants, without waiving their aforesaid objections to the jurisdiction of this court, say that the plaintiff, on the 17th day of March, 1861, by his son Frank P. Slocum, borrowed of the defendants the sum of \$80 in cash, promising to return the same immediately, which has not been done, but that the said sum, with the interest thereon, remains due and unpaid, and is a just and valid set-off and counter-claim to the alleged claim of the plaintiff herein. *Fifth*. And for a further defense, the defendants, without waiving their aforesaid objections to the jurisdiction of this court, say that on or about the 6th day of May, 1861, the plaintiff, as they are informed and believe, through the agency of and by collusion with the said defendant Frank P. Slocum, abstracted from the pocket-book of the defendant's firm four negotiable promissory notes for \$300 each, made by the plaintiff to the order of the defendants, each dated January 31st, 1861, two of which matured on the 3d of June, and on the 3d of August, 1861, respectively, and the other two of which will mature respectively on the 3d of October and February next, and that the said four notes were, at or about the time of the making thereof, delivered by the plaintiff to the defendants for value received; that they are the lawful property of the defendants and are unpaid, but are fraudulently retained and held by the plaintiff, and that the

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claim therefor is a further just and valid set-off and counter-claim to the notes in the complaint mentioned. *Sixth.* And for a further defense, by leave of the court first duly obtained, and without waiving their aforesaid objections to the jurisdiction of this court, the defendants say that, as they are informed and believe, since the commencement of this suit, and on the 14th day of September instant, the plaintiff, through the agency of and by collusion with the said defendant Frank P. Slocum, abstracted from the defendants' store, and still retains in his possession, goods belonging to the defendants, amounting at cost price to \$769.53, and the market value whereof is \$1000, or thereabouts. And these defendants say that the claim therefor is, as they are advised and believe, a further just and valid set-off and counter-claim to the notes in the complaint mentioned." Wherefore the defendants demanded judgment for \$500 against the plaintiff.

The actions being at issue, the defendants therein sued out a writ of prohibition, commanding the marine court to desist and refrain from any further proceedings therein until the next special term of the supreme court to be held at chambers in the city hall, in the city of New York, on the first Monday of October, 1861, and until the further order of the court; and directing the marine court to show cause before the supreme court, at that time and place, why it should not be absolutely restrained from any further proceedings in such actions. The marine court made a return, in each case, in which it stated that the attachment in said action was duly issued out of this court on the 9th day of September, 1861, returnable on the 12th day of September. That the same was duly returned on the said 12th day of September, personally served on the defendant, with an inventory of the property of the defendants attached by the sheriff thereunder. That on the return day of said attachment the defendants therein appeared by their counsel, and moved to dismiss the proceedings for want of jurisdiction, on account of the insufficiency of the plaintiff's affidavit; which motion was over-

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ruled. That no appeal had been taken from said decision, but, on the motion of the defendants, the trial of the case was adjourned to the 24th day of September, 1861, and the plaintiff was ordered to serve his complaint, and the defendants to answer before that day. That upon the adjourned day the said action was called for trial, at which time the writ of prohibition was served. Whereupon the trial of the action was adjourned to the 14th October, 1861.

On the return day of the alternative writ, the court, after a hearing of the respective parties, made an order denying the motion to make the writ absolute, and discharging the alternative writ, without costs. The following reasons were assigned by the justice at the special term, for his decision.

SUTHERLAND, J. "The general principle is, that courts, in rendering judgments, must have jurisdiction not only of the subject matter, but also of the person; but I understand that a writ of prohibition issues only on the ground that the inferior court or tribunal is taking cognizance, or is about to proceed to take cognizance, of matters not within its jurisdiction. (*Bac. Abr. Prohibition, K.*) In this case it appears that the three suits in the marine court, against the relators, were severally commenced by attachment. The attachments were processes to obtain the appearance of the relators, as defendants in those suits. They claim that the attachments were irregularly issued; that the affidavits on which they were based were insufficient, and did not give the marine court jurisdiction; but this question of jurisdiction relates to the person only, and need not, and cannot, I think, be properly determined on this application for a writ of prohibition. Besides, the relators, on the return of the attachment, appeared, and moved to discharge them, on the ground that the affidavits on which they were issued were insufficient; which motion was denied. If the marine court decided erroneously on this point, the remedy is by appeal; or, per-

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haps, by action, when any judgments which may be obtained shall be enforced or attempted to be enforced.

The remaining question, then, is whether the marine court has jurisdiction of the subject matters of the three actions. The three actions are on three several promissory notes for \$600, \$650 and \$600, respectively; the respondent Slocum, the plaintiff in those suits, claiming to recover only the amount of \$500 in each suit on one of the notes. The relators, in their answer in each suit, after pleading to the jurisdiction on several grounds, set up three several counter-claims arising on contract; one for \$80, one for \$1200, and the other for \$1000. The answers are severally verified.

The question is whether the marine court has now jurisdiction of the subject matter of these actions, and can proceed in them to hear the proofs of the parties. In my opinion it has such jurisdiction, and can proceed to hear the proofs of the parties.

By the code, in an action arising on contract for the recovery of money only, the marine court had jurisdiction when the amount *claimed* did not exceed \$100, but it had no jurisdiction of a matter of account "where the sum total of the accounts of both parties, *proved* to the satisfaction of the justice, shall exceed four hundred dollars." (*Code*, §§ 65, 53, 54, *sub.* 4.) By the act of April 17th, 1852, § 9, the jurisdiction of the marine court was extended, in these words: "In all cases in which the jurisdiction of said marine court is now limited, so that there can be no recovery therein for a larger amount than \$100, the jurisdiction is hereby extended, so that in such actions the *recovery* of *either* party may hereafter be to the amount of \$250, with costs," &c. By the act of July 21, 1853, § 2, the jurisdiction of the marine court is further extended, in these words: "In cases where the jurisdiction of said court is now limited, so that there can be no *recovery* therein for a larger amount than two hundred and fifty dollars, the jurisdiction is hereby extended, so that in such cases the *recovery* of either party may hereafter be to the amount

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of \$500, notwithstanding that the accounts of both parties may exceed \$400." It will be seen that the limitation of the jurisdiction, by the provisions of the acts of 1852 and 1853 quoted, is as to the amount of the *recovery* of *either* party. By the act of 1853 the marine court has jurisdiction, "notwithstanding that the accounts of both parties may exceed \$400." The excess is not qualified or limited. It would appear that the limitation of jurisdiction as to matters of account by the code, § 54, sub. 4, which limitation depended on the "sum total of the accounts of both parties, *proved to the satisfaction of the justice*," if it applied to the marine court, has been wholly taken away by the act of 1853; and yet, by the express words of the act, the marine court cannot render a judgment for either party for over \$500.

Where there are claims and counter-claims arising on contract, I think the question of jurisdiction must be determined by the admissions or proofs, and not by the mere statement of the claims in the pleadings, although verified. If the respondent Slocum proves his claim, and the relators prove their whole counter-claim, or to an amount exceeding one thousand dollars in any one of the three suits, the court can give them judgment for \$500 only; and as they cannot be compelled to split up any one of their claims arising on one contract, or to release any part of it, in my opinion the result is that the marine court should, on such proof, and upon the relators declining to take judgment for \$500 only, dismiss the suit. But in case the marine court should refuse to do so, either upon the ground that the proof was not satisfactory, or upon any other ground, I do not mean now to express an opinion on the question whether the relators' remedy would be by writ of prohibition or by appeal, or by an equitable action to stay Slocum's judgments in the marine court, until they could recover judgment for their counter-claims in a court of sufficient jurisdiction.

In any view of the question of jurisdiction, the relators are *premature* in their application for a writ of prohibition. In

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this court, the respondent Slocum could have included his claims on the three several notes in one action; and if he had brought three actions, one on each note, he would have done so subject to the power of the court to consolidate them into one action. There are some old common law cases which would go to show that the respondent Slocum had no right to reduce his claim on the relators' three notes severally, for the purpose of giving the marine court jurisdiction; that his doing so should be considered a fraud on this court, and that upon that ground a prohibition should be granted. There are also old common law cases which go to show that the bringing of the three several actions, on the three several notes, in the marine court, at the same time, should be considered as intended to defraud this court of its jurisdiction. (*See Bac. Abr. Prohibition K, and cases there cited.*) But I doubt the applicability of this principle of fraud to the question of jurisdiction in this case, at this day, or to the system of courts here, where we have several courts of superior concurrent jurisdiction. Certainly this court has no cause to complain of being defrauded of its jurisdiction; and I do not see how the relators can complain of being acquitted of the payment of \$100 on each note. The cases cited by the counsel for the relators, to show that no facts being set forth in the returns of the marine court in answer to the alternative writs, an absolute prohibition must issue of course, assume that the facts upon which the alternative writs issue, unanswered, are sufficient to authorize the absolute writ.

Upon the whole, I think the application for the absolute writs should be denied, but without costs."

From the order entered in pursuance of this opinion, the relators appealed to the general term.

*H. D. Sedgwick*, for the appellants.

*Livingston K. Miller*, for the respondents.

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*By the Court*, INGRAHAM, P. J. We see no good reason for granting the writ of prohibition asked for on these motions. The writ does not issue to correct irregularities or errors in administering justice by inferior courts, but to prevent courts from going beyond their jurisdiction in the exercise of judicial power in matters over which they have no cognizance. (2 *Hill*, 367. 7 *Wend.* 518.) It ought not to issue where the party has a complete remedy in some other and more ordinary form. (2 *Hill*, 367.)

In the present case, the first ground upon which the writ is asked for is, that the affidavit on which the proceedings complained of were founded did not show certain matters which the relators think were necessary, to justify the issuing of the attachments. This is so clearly a matter of practice in the court, to be remedied first by a motion to the court, secondly, by an appeal to the general term, and next to the common pleas, that it seems only necessary to mention it to show that the error is not to be corrected by a writ of prohibition.

Another ground on which the relator asks for the writ is, that the debt for which the plaintiff was entitled to sue was larger than the jurisdiction of the marine court permitted to be recovered in that court. To obviate this difficulty the plaintiff remitted all over \$500, and only sought to recover the latter sum. We think the defendant, who is relator here, has no cause to complain because the plaintiff sees fit to reduce the amount of his indebtedness by relinquishing to the debtor a part of his debt. It does not affect the jurisdictional question. The person, and the subject matter, were both within the jurisdiction of the court, and there is nothing to show that the court attempted to exceed its powers, in rendering judgment for a greater amount than the statute allowed. Nor do we consider it any act in fraud of the jurisdiction of the higher courts, calling for this particular remedy. At the present day there is no necessity for such proceedings, to preserve the jurisdiction of the courts—cer-



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tainly none for applying such a remedy simply because the creditor gives to his debtor one fifth of his indebtedness.

The objection as to counter-claims is also expressly provided for in the act relating to the marine court.

None of these grounds show any attempt on the part of the court to exceed its jurisdiction, or to exercise any authority not conferred upon it by law. There is therefore no reason for issuing this writ, and the order made at special term, denying this application, should be affirmed.

[NEW YORK GENERAL TERM, February 8, 1862. *Ingraham, Leonard and Clarke, Justices.*]

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BRUCE and others vs. DAVENPORT and others.

An agent cannot act for his own benefit in relation to the subject matter of the agency, to the injury of his principal.

An agent is bound to follow the instructions of his principal; and if he neglects to do so, he will make himself liable for the loss or damage which his principal sustains.

The plaintiffs were employed by T. D., in behalf of himself and J. D., who were partners, as their brokers and agents, to sell a certain promissory note held by them, made by third persons, and were instructed to sell the same at a discount of twelve per cent, without their indorsement and without recourse. Subsequently the plaintiffs called upon J. D., in the absence of T. D., and by falsely stating that T. D. had before indorsed similar notes which the plaintiffs had been employed to sell, and concealing from him the fact that T. D. had instructed them to sell without recourse, procured from him the indorsement of the name of the firm upon the note. *Held* that the indorsement having been obtained by an abuse of the confidential relation of principal and agent, did not constitute a contract upon which the latter could sue the former.

*Held also*, that for the same reasons the indorsement could not be considered a modification of the instructions to sell without recourse; and that for whatever damage the principals had sustained, by the disregard of their instructions, the agents were liable.

**A** PPEAL from a judgment entered upon the report of a referee. The action was brought against the defendants

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as indorsers of a promissory note made by the firm of Beale, Mellick & Dewitt, to their own order, dated March 20th, 1857, for the sum of \$2350.69, payable four months after date. The defendants put in an answer, in which they alleged: That, previous to the making of the note in suit, the defendants had other similar notes, made by the same parties, and that Thomas Davenport, one of the defendants, took said notes to the plaintiffs, as brokers, to sell without their indorsement, and without recourse to them in any event. That the plaintiffs undertook to sell and did sell them in that way at an usurious rate of interest. That after said agreement and the sale of said notes, Thomas Davenport, one of the defendants, left the note mentioned in the complaint with the plaintiffs, for sale without their (the defendants') indorsement, without recourse to them, and they undertook and agreed so to sell the same. That the plaintiffs, well knowing and understanding said agreement and the facts, went to James S. Davenport, in the absence of the said Thomas Davenport, and falsely stated and represented to him that said Thomas Davenport had indorsed all the other similar notes in the firm name, and would indorse the one in suit if he were present, and, by these and other false and fraudulent representations, induced the defendant James S. Davenport, without the knowledge or consent of the other defendants, to indorse said note in the firm name of the defendants; and the defendants alleged that the plaintiffs never sold said note, and they claimed that said indorsement was without any consideration, and was obtained by fraud, false representations and deceptions, and is void; and that they are not legally or equitably bound as indorsers, by reason of the fraud practiced upon, and the false and fraudulent representations made to, said James S. Davenport. The defendants also set up the statute against usury, as a defense, and alleged, by way of counter-claim, the payment of \$600 to the plaintiffs by the makers of the note.

It appeared on the trial, before the referee, that Thomas

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Davenport did not hear of the transaction until a day or two before the maturity of the note; when he and J. S. Davenport repudiated the indorsement—as having been obtained by fraud and false representations. The referee reported in favor of the plaintiffs for the whole amount claimed; and the defendants appealed from the judgment.

*Wm. W. Niles*, for the appellants.

*Chas. S. Webb*, for the plaintiffs.

*By the Court*, LEONARD, J. An agent cannot act for his own benefit in relation to the subject matter of the agency, to the injury of those by whom he is employed. The relation of principal and agent is of a confidential character, demanding the utmost truth and good faith between them. An agent is required to follow the instructions of his principal, and if he neglects to do so, he will make himself liable for the loss or damage which his principal sustains.

In this case the acting principal, one of the defendants' firm, instructed the plaintiffs, who were the agents of the defendants in the matter, to sell a certain promissory note, belonging to the defendants and then committed to the plaintiffs for sale, without recourse to the defendants, at a discount of twelve per cent. These instructions it was necessary for the plaintiffs to follow; and unless they were afterwards changed or modified by the defendants, the plaintiffs are liable for the loss or damage which the defendants sustain in consequence of the disregard of those instructions.

The modification of these instructions, if any, arises from the fact that another member of the defendants' firm, in the absence of the member who gave the instructions to the plaintiffs, and delivered the note to them, indorsed it with the name of the defendants' firm. Such an act, under ordinary circumstances, would clearly amount to a revocation of instructions to sell without recourse. Either member could

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bind the firm by indorsement in the regular course of business for the benefit of the firm.

In the present case it does not appear that the member of the defendants' firm who indorsed the note knew that his absent partner had instructed the plaintiffs to sell without recourse, while the plaintiffs did know it, and omitted to communicate the fact to them when he applied for the defendants' indorsement. The plaintiffs also induced the indorsement, by stating that the absent partner had before indorsed the notes of the same makers which the plaintiffs had been employed to sell. This latter statement was wholly without foundation in fact. The plaintiffs thereupon indorsed the note for their own purposes, without any request from the defendants, and procured it to be discounted at seven per cent, and made return to the defendants of the proceeds of the note at the rate of twelve per cent discount, retaining the difference in the rate of discount, fraudulently, for their own benefit.

The note not being paid at maturity the plaintiffs took it up, to protect their own indorsement, and now bring this action to recover of the defendants as prior indorsers.

The conduct of the plaintiffs was marked by an abuse of the trust reposed in them, at every step. An indorsement so obtained by an agent cannot be considered as a change or modification of his instructions, or as creating the usual obligation as to the agent which arises from the act of indorsing mercantile paper. The plaintiffs well knew that one member of the defendants' firm had expressly refused to indorse that particular note, and that, as to that particular member, there was not only no contract by the indorsement, but an absolute refusal to make one. The indorsement deprived the defendants of the advantage of disposing of the note in the market to such persons as might choose to purchase it without the indorsement, which the defendants desired to avoid.

There is no evidence tending to show that the makers of the note were not in good credit, or that the defendants had

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any knowledge of their circumstances pecuniarily, which was not common to every body in the community. No improper motive is to be attributed to the defendants, in the absence of proof, for desiring to sell the note without incurring liability by indorsement.

If the defendants are to be held liable by this indorsement, then the design of the financial member of the firm in selling the note without recourse to them will be frustrated, by the action of the agents who were employed to dispose of the note in a different manner.

It has been said that the defendants have had the plaintiffs' money, and ought therefore to be held liable. If so, let the plaintiffs bring their action directly for money loaned or paid out for the account of the defendants.

But, in my opinion, no contract exists between the plaintiffs and defendants upon the indorsement of this note. The indorsement was obtained by an abuse of the confidential relation of principal and agent, and does not as between them, in favor of the guilty party, constitute a contract.

The same reasons will also prevent the indorsement from being considered a modification of the instruction to sell without recourse. Whatever damage the defendants have sustained by the disregard of their instructions, the plaintiffs must bear.

The judgment should be reversed and a new trial be ordered, with costs to abide the event, and the cause be sent back to the referee.

[NEW YORK GENERAL TERM, February 8, 1862. *Ingraham, Leonard and Clarke, Justices.*]

UNDERHILL *vs.* THE NORTH AMERICAN KEROSENE GAS  
LIGHT COMPANY.

The defendants invited estimates for 26 or 27 meerschaums, or retorts, to be delivered in certain numbers, at certain dates; adding, "any number at our option." The plaintiff offered, in writing, to build 26 or 27, of brick, for \$1650 each, or of iron at \$1850 each. He then added this clause: "All the above to be in accordance with 1st plan and specification dated 4th inst., and to be delivered at such dates and *in such numbers* as you may specify within the next 65 days." To this proposition the defendants replied, in writing, assenting to the same and to the terms thereof; and adding, "the above to be 27 meerschaums." *Held* that the plaintiff proposed a *variance* from the terms named by the defendants, in respect to the *option*, and the same was assented to by the defendants. That it was therefore an agreement for 27 meerschaums.

*Held also*, that the plaintiff was entitled to recover the damages which he had sustained on the breach of the contract by the defendants in refusing to take the whole number of meerschaums agreed on.

ON the 4th day of January, 1859, the respondents desired to have estimates on some pots, boilers or tanks, for the manufacture of kerosene oil, called "meerschaums," which they proposed to build of iron or brick. For that purpose, a specification and some drawings were prepared for the inspection and proposals of mechanics. In those specifications the respondents desired twenty-seven meerschaums to be constructed thereunder, of brick, deliverable at different times prior to the first day of July, 1861. After specifying that eight (the remainder of the twenty-seven) were to be delivered on the 1st July, the specifications contained a clause, "any number at our option," and then continued: "In addition to the above, we wish estimate for the same number of iron meerschaums, to be delivered as above." They then proceeded with a description of the iron ones so desired. The appellant, as one of the mechanics to whom these plans and specifications were delivered for proposals, concluded to make an estimate for twenty-six or twenty-seven of those meerschaums; consequently, on the 10th of January, 1859, he wrote a proposal to the respondents to the effect that he would contract to construct twenty-six or twenty-seven of

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*Underhill v. North American Kerosene Gas Light Co.*

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the brick meerschauts for \$1650 each, or twenty-six or twenty-seven of the iron meerschauts for \$1850. They were to be constructed in accordance with the first plans and specifications, dated January 4, 1859, and to be delivered at such dates, and in such numbers, as the company might specify in the next sixty-five days. On the same day, the secretary and acting business man of the company assented to the proposition of the appellant, and wrote to him to that effect. The appellant constructed seven meerschauts, each of twenty-five tons' capacity, and made one of a hundred tons, as an experiment. He stopped manufacturing, because he was prohibited from doing so by the respondents. They subsequently failed to pay the notes given for the meerschauts that were manufactured, and the company went into insolvency. The appellant was left with a large amount of manufactured iron on hand. The cost of the construction of each meerschaut was about \$1020; the price was \$1850 each. The actual loss of profit was about \$830 on each machine, which, on the twenty left unmanufactured, would be over \$16,600. The appellant brought his action to recover those damages. The referee found all the facts in favor of the appellant, excepting that he held that by the written memorandum subjoined to the specification, the option of any number of the meerschauts to be delivered was reserved to the defendants, and constituted one of the terms of the contract, and in stopping the work the respondents did what they had a right to do, and were not responsible for the damages sustained by the plaintiff on the work not executed, but contracted to be done. He therefore reported in favor of the defendants, and the plaintiff appealed from the judgment.

*D. McMahon*, for the appellant.

*S. E. Lyon*, for the respondent.

*By the Court*, LEONARD, J. The question here involved is the construction and meaning of a contract between the

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Underhill v. North American Kerosene Gas Light Co.

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parties for the manufacture of meerschauts, or retorts, used in extracting oil from bituminous coal. The defendants insist that the contract gives them the option as to the number to be built, while the plaintiff insists on the opposite rule.

The defendants invited estimates for twenty-six or twenty-seven meerschauts, to be delivered in certain numbers at certain dates. They then add, "any number at our option." The plaintiff offered in writing to build twenty-six or twenty-seven of brick for \$1650 each, or of iron at \$1850 each. He then adds this clause: "All the above to be in accordance with 1st plan and specification, dated 4th inst., and to be delivered at such dates and in such numbers as you may specify within the next 65 days."

We think the plaintiff here proposes a variance from the terms named by the defendants, in respect to the option. The offer is to build the whole number mentioned, giving the defendants sixty-five days within which they are required to specify the dates and numbers of the deliveries. To this proposition, made by the plaintiff, the defendants reply in writing on the same day, "and assent to the proposition and terms therein made." The defendants also add, "the above to be 27 meerschauts."

This was an agreement for twenty-seven meerschauts. The variation in the contract proposed by the plaintiff was assented to by the defendants.

The plaintiff was entitled to recover the damages which he had sustained on the breach of the contract by the defendants in refusing to take the whole number agreed on.

The judgment and report must be set aside, and the case sent back to the referee for a new trial, with costs to abide the event. The evidence already taken to stand, and each party to be at liberty to offer such further evidence as they may think proper.

[NEW YORK GENERAL TERM, February 8, 1862. *Ingraham, Leonard and Clarke*, Justices.]



**RAWLS vs. THE AMERICAN LIFE INSURANCE COMPANY.**

One having an interest in the continuance of the life of another, as his creditor, may insure the life of the debtor, and the contract for that purpose will be valid.

The fact that the debt is due to the creditor as a member of a partnership, and from another firm, of which the person whose life is insured is a member, does not alter the rule.

If such a policy of insurance is valid in its inception, the circumstance that the statute of limitations had run against the debt, before the occurrence of the death, will not affect it.

The interest of the creditor, in the continuance of the life of the debtor, cannot be held to have ceased entirely, because the statute of limitations has operated against the debt.

It is not necessary that the party holding a policy on the life of another should have an insurable interest in such life, at the time of the death, to make the policy valid, if it was valid in its inception.

A life policy is not regarded as a mere contract of indemnity.

The case of *Goodsall v. Baldero*, (9 East, 72,) disapproved, and shown to have been overruled in England, and not now law, there.

In an action by a creditor, upon a policy on the life of his debtor, the declarations of the debtor in his lifetime, in respect to his intemperate habits, or the suppression of information, are not admissible in evidence.

The omission of a person whose life is insured to make any statement in respect to any particular habit, not called for by any general or specific question put by him, will not be such a concealment as to avoid the policy. It is sufficient if he answers truly all the questions put to him, without evasion or concealment.

**M**OTION for a new trial, upon a case and exceptions. The action was upon a policy of insurance issued by the defendant, dated 28th July, 1853, for \$5000, on the life of John L. Fish, of Rochester, N. Y., payable to the plaintiff. The complaint averred the execution and delivery of the policy, and set forth the policy and the conditions annexed thereto. It also averred the payment of the annual premiums on the policy up to July 1, 1857, the interest of the plaintiff in the life of Fish, the death of Fish at Rochester on the 24th day of February, 1857. That from the time the policy was made, to his death, Fish fully performed and complied with all the conditions of the policy to be performed and complied with by him, and did not do any act or thing pro-

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hibited by the terms of the policy; and that the policy was in full force at the time of his decease. That due notice and proof of the death of Fish, and of the circumstances attending the same, were furnished to the defendant March 6, 1857, in the manner provided in the conditions annexed to the policy, and that although more than ninety days had elapsed since the notice and proofs were furnished, the defendants had not paid the \$5000. The answer of the defendants contained five articles or parts. The first ignored, and so traversed the plaintiff's interest in the life of Fish. The second alleged that Fish did not perform and comply with all the conditions of the policy to be performed and complied with by him, and did many acts and things prohibited by the terms of the policy. Also, that the plaintiff had not made proof, in the manner provided in the conditions annexed to the policy, of the death of Fish, and that such pretended proofs omitted to state truly the cause of his death. The third averred that among the written statements and representations made to the defendant by the plaintiff respecting the life, health, &c. of Fish, presented to the defendant before issuing the policy, and in consideration of which the policy was issued, there was a written statement and representation by Fish, in which he stated and represented that his health was, at that time, good; that he had not been afflicted since childhood with liver-complaint, or general debility. There was also a statement by one Shipman, in which Shipman stated that he believed Fish to be then in good health; that he considered Fish healthy, and free from any circumstance tending to shorten life; that he believed Fish did not indulge in any habits or practices which had impaired, or would impair, his health or constitution; that he believed that the occupation, employment and manner of life of Fish did, in his opinion, agree with his constitution; and that Fish's prospects of attaining old age were as good as those of any man. That the plaintiff and Fish at the same time referred to one Marsh respecting the gen-

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eral health and manner of life of Fish, and procured and delivered, or caused to be procured and delivered, to the defendants, a paper signed by Marsh, and which was one of the written statements on which the policy was issued, in which Marsh declared that Fish did not, to his knowledge, indulge in any habits or practices which had impaired or would impair his constitution and general health; that he had not any reason to believe that Fish had an impaired or feeble constitution; that he considered Fish healthy and free from any circumstances tending to shorten life; that his opinion was, considering the general longevity of Fish's family, his occupation, habits, constitution, general and present health, that the chance of Fish's living to old age was as good as that of ordinary persons. That the plaintiff and Fish procured from one Holmes, and forwarded to the defendants a statement of Holmes, that Fish did not, in his opinion, indulge in any practices or habits which had impaired or would impair his constitution and general health; that he believed the questions contained in the application were fully and properly answered, and that no material fact was omitted; and that Fish was likely to live to old age. That the policy was issued on the express warranty of the party assured, that all the said statements were and that each of them was true; and that if any misrepresentations or concealments were contained in the statements or representations, the policy should be void, and all the premiums should be forfeited to the company. And that each and every statement in the said written statements and representations of Fish, Shipman, Marsh and Holmes, in this article of the answer referred to, was false; that Fish and the plaintiff, before and at the time of issuing the policy, had notice thereof; and that by reason of the premises the policy was void. The fourth article of the answer averred that before and at the time of issuing the policy, Fish was and had long been a man of licentious, intemperate and disorderly habits and practices, and frequently or habitually indulged in habits and practices which had impaired or would

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impair his health and constitution, and shorten his life; and in the frequent or constant habit of neglecting or violating the laws or rules of good conduct or regimen, on which health and long life greatly depend. All which the plaintiff, Fish, Shipman and Marsh well knew, or had good reason to believe, at the time their representations were made, and at and before the issuing of the policy; and though the defendant was ignorant thereof, they did not nor did any of them give notice thereof to the defendant, but concealed the same; and the policy was therefore void. The fifth article averred that Fish "died in consequence of intemperate drinking," and that by reason thereof the said insurance ceased and terminated; and no right of action had accrued thereon to the plaintiff. On the trial the defendants, on the call of the plaintiff, produced and the plaintiff put in evidence the proofs of loss furnished by him to the defendants, and proved that such proofs were delivered to the defendants in March, 1857. The plaintiff also proved that on the 28th day of May, 1850, Fish and one Holmes, as partners, were indebted to the firm of Reed & Rawls, of which the plaintiff was a member, in the sum of \$9675.73, and that no part of the debt had been paid. The plaintiff then rested, and the defendant moved for a nonsuit, which was denied, and the defendant excepted. The defendant then offered and read in evidence the statements of Fish, Shipman and Marsh, and adduced testimony for the purpose of showing that, prior to the application for the policy in suit, July, 1853, Fish was of intemperate habits. The plaintiff adduced testimony tending to show that Fish was not of intemperate habits when the policy in suit was applied for. The court then charged the jury; to portions of which charge the counsel for the defendant excepted. The following question was submitted to the jury for their answer: "Question. Was John L. Fish, on the 16th of July, 1853, to the knowledge of Mr. Marsh, in the habit of intemperate drinking, to such an extent as had impaired or would, in the opinion of Mr.

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Marsh, impair his constitution or general health?" The jury found a verdict for the plaintiff for \$6081.57, and answered the question submitted to them, as follows: "The jury think the statement made by Mr. Marsh, on the 16th of July, 1853, was truthfully made, according to the best of his knowledge."

*L. Birdseye*, for the plaintiff.

*H. R. Selden*, for the defendants.

*By the Court*, JOHNSON, J. The contract of insurance, if honestly and fairly obtained, was a valid contract in its inception. The plaintiff had an interest in the continuance of the life of the party insured, being his creditor. The fact that the debt was due to him as a member of a partnership, and from another partnership, of which Fish was a member, can make no difference. Fish, as a member of his firm, was individually liable for the whole debt, and the plaintiff, as a partner in his firm, was interested in the whole debt. It seems to me there is no difficulty whatever in this. The contract of insurance does not relate to the payment of the debt, but to the continuance of the life insured, and all that is necessary to make the contract a valid one is, that the party procuring it should have some interest in the continuance of such life. (*Ruse v. Mutual Benefit Insurance Co.*, 23 N. Y. Rep. 516.) If a policy like the one in question is to be regarded as a mere contract of indemnity, being valid in its inception, it seems to me that the circumstance that the statute of limitations had run against the debt, before the occurrence of the death, would not affect it. Because, whatever may be said in regard to the statute upon the debt when it has once run, it is certain that the debt is not extinguished, to all intents and purposes, as in the case of a payment. The law still recognizes its existence, so far as to permit it to form a valid foundation and consideration for its own renewal by a new promise. And indeed without any

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new promise it may be enforced, by action, unless the defense of the statute is set up by answer. The law will scarcely presume that the debtor will, under such circumstances, either refuse to revive the debt, by a new promise, or that he will interpose the defense of the statute of limitations in case an action is brought to recover the debt. I think it cannot be held that the interest of the creditor, in the continuance of the life of his debtor, has ceased entirely, because the statute of limitations has operated against the debt.

But it is unnecessary that the party holding the life policy should have an insurable interest in the continuance of the life assured, at the time of the death, to make the policy valid, if it was valid in its inception. (*St. John v. The American Mutual Life Ins. Co.*, 3 Kern. 31, and note at the end of the case. *Valton v. The National Loan Fund and Life Assurance Co.*, 22 Barb. 9.) A policy of this kind is not regarded as a mere contract of indemnity. Indeed I am entirely unable to see how, upon principle, and in the nature of things, it can be regarded as a contract of indemnity at all, in any proper sense of that term. Marine and fire policies are strictly contracts of indemnity, as all the cases and authors agree. But how can a life policy be regarded as such, whether the life is assured in favor of the party himself, or in favor of his creditor? In the case of a creditor, if the undertaking was to pay, in case the debt was not paid during the lifetime of the debtor, or within a certain specified time, it would be clearly in the nature of a contract of indemnity. But when the undertaking, in terms, is to pay a certain fixed sum within a specified time after proof of the death of a certain person, in consideration of an annual sum to be paid to the party thus undertaking, it is impossible to see how it can be regarded as a contract of indemnity. If it were a mere contract of indemnity, how could it be upheld in the hands of an assignee, who has not and never had any interest whatever in the life assured, except that which springs from the contract. The nature and consideration of the un-

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dertaking are the same, precisely, whether the policy is given to the individual, upon his own life, or to his creditor; and it is difficult to see why the obligation, or the remedy, should differ in one case from the other.

The case of *Goodsall v. Baldero*, (9 *East*, 72,) in which it was held that a policy like the one in question was a contract of indemnity, and that where the debt was paid, there could be no damnification, and no action would lie upon the policy, whether the debt was paid from the estate of the debtor, or with funds from some other source, has been recently overruled in England, after much and careful consideration, in the exchequer chamber, and is not now law there. (*Dalby v. Life Assurance Co.*, 18 *Com. Bench Rep.* 365; 80 *Eng. Com. Law Rep.* 365.) As an original question, independent of the authority of the books and of adjudged cases, it can scarcely admit of doubt that the decision in *Goodsall v. Baldero* was erroneous, and founded in a palpable misconception of the nature and character of such a contract. It absolved the insurer from the performance of his obligation, not because the event upon which payment was to be made had not happened, but because something else had been done for which no provision had been made by the contract; and that too by parties in no way interested in the contract, and being in no privity with either of the parties thereto. The insurers were permitted to keep the consideration, which had been punctually paid, and relieved from paying what they had expressly undertaken, upon fair and ample consideration, to pay, because the agreement was assumed to be in law different from what the parties had in express terms made it, when they entered into it.

The contract received its interpretation not according to its terms and stipulations, but its obligation upon the insurers was made to depend upon a circumstance wholly collateral and accidental, and in respect to which the parties by their contract made no stipulation whatever. It was treated precisely as though the non-payment of the debt was insured

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against. However firmly this doctrine may now be rooted in the text books and decisions in this country, it is impossible, as it seems to me, that it can stand when a case in which it is directly involved is presented for adjudication in our courts of last resort.

But, as I have before remarked, I do not consider it necessarily involved in this case. The position of the defendant, on this question, is a step decidedly beyond the rule laid down in *Goodsall v. Baldero*, as there is no pretense here that the plaintiff has ever received his debt, or any part of it, since the contract was entered into; and I do not think the doctrine of that case should, under any circumstances, be extended, even if it is to be followed in cases precisely analogous.

Even if the defendants would have been entitled to subrogation, upon payment, according to the terms of the policy, there is nothing in its terms which required the plaintiff to keep the debt alive for their benefit, and his neglect to do so cannot affect their obligation to pay as they have agreed.

The action was not prematurely commenced. The proof of the death of Fish seems to have been made in March, 1857, and it does not appear that the action was commenced previous to the expiration of ninety days thereafter.

I do not see upon what principle the previous declarations of Fish, in respect to his habits, could have been admitted as evidence upon the trial. It was not his contract, and he had no authority to bind the plaintiff, by any statement he might make in regard to himself, whether true or false. It would have been mere hearsay, and was properly rejected. His declarations, as between these parties, were incompetent to prove either the fact of his previous intemperate habits, or the fact of the suppression of the information.

The question to the witness Moore, as to whether he would regard a person who was in the habitual use of intoxicating drinks to excess, an insurable subject, was, I think, properly



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overruled. The witness, however eminent as a physician, might have very little knowledge as to what kind of persons insurance companies might properly venture to insure. Even if he had been in the business and practice of insuring lives, the evidence would have been incompetent, as it would have been, in effect, but an opinion as to what insurers of lives ought to do in certain cases. (*Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72, 78, 79. *Campbell v. Rickards*, 5 Barn. & Adol. 840; 27 Eng. C. L. Rep. 207.) It was competent for the plaintiff to prove by Holmes that he presented the paper and read it to Marsh; especially in view of Marsh's evidence, that he had no recollection of the transaction. It was certainly proper, to show that no fraud had been practiced upon Marsh, or in getting up the papers on which the policy was issued.

The evidence in answer to the question put to the witness Holmes, as to whether in his opinion Fish did, at the time, indulge in any practices or habits which had impaired, or which would impair, his constitution and general health; and also that in answer to the question put to the witness Shipman, as to whether he believed his answers to the questions in the papers correct, at the time, can only be sustained on the ground that the defendants, in their answer, had directly alleged that these persons in answering the questions in the papers, upon which the policy was issued, had in these respects made statements contrary to their opinions, and to what they believed to be true. As the defendants had in their answer made that issue, I think it was competent for the plaintiff to meet it by his evidence.

The questions put to the witness Shipman, and also to the witness Dean, as to what their opinions would have been in respect to Fish's health, and the character of the risk, if they had known his habits and practices to be as alleged by the defendants, were of the same character as the question to the witness Dr. Moore, and were properly overruled, for the same reason. I think the statements of Dean and Holmes were

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properly received in evidence as part of the papers on which the policy was issued. That they were so, appears by the answer, and the defendants had introduced the other papers and made them part of the evidence in the case. Under such circumstances, it was manifestly proper that all the papers on which the application was founded, and all those on which the defendants acted in issuing the policy, should appear in the case.

The statements of Marsh cannot, I think, be regarded as warranties binding upon the plaintiff. It appears, by the terms of the policy, that it was issued upon the statements on file, and dated July 15, 1853. The statements of Marsh were not made at that date, but afterwards, and then not as part of the application of Fish or of the plaintiff; and neither of them knew what the statements were. And although it may be true that the defendants were influenced in issuing the policy, to some extent, by the statements of Marsh, and Holmes, and Dean, and acted upon them in part, still, as their statements were not furnished by the plaintiff, or Fish, and the application was not based upon them, they are not their statements, and hence not warranties.

It is quite clear, I think, that Holmes was acting throughout as the agent of the defendants, and in no other way. It seems to me that it is not in the power of the defendants to convert statements which the plaintiff did not furnish, or rely upon, and of the character of which he had no knowledge, into warranties to defeat the policy, even though they may have been influenced by them in giving the policy. The judge charged, that inasmuch as Marsh was referred to as an acquaintance and friend of Fish, the plaintiff would be responsible for the good faith, and for the truth and honesty, of such statements, and if they were untrue in point of fact it would avoid the policy, whether such untruth originated in fraud, or mere negligence, or want of recollection. This, it seems to me, was going quite far enough.

• I think the judge was right, also, in charging the jury that

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if Fish answered truly all the questions put to him, without evasion or concealment, it was sufficient, and that it was not necessary for him to make any statement in respect to any particular habit, not called for by any general or specific question put to him; and that the omission, under such circumstances, to make any statement in respect to such habit, would not be such a concealment as to avoid the policy. As to the condition of his health he did answer fully, and as the jury have found, truly, all the questions propounded. But in respect to his habits of eating or drinking no question was put to him, and he had the right to suppose that no information was desired by them upon that subject; and the omission to give it in such case is no concealment.

No court would, I think, require a party to make a statement as to his habits and practices, some of which might possibly operate prejudicially upon his health, where nothing of the kind is called for by the questions propounded. The presumption is, that the insurers questioned the party upon all subjects which they deemed material, and all which were within the contemplation of the parties at the time; and beyond that, clearly, a party is not bound to disclose.

There was therefore no error, either in the rulings on the trial or in the charge, and a new trial must be denied.

[MONROE GENERAL TERM, March 8, 1862. *Smith, Welles and Johnson*, Justices.]

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**ANN MARIA WYMAN, adm'x &c., vs. DAVID B. PROSSER  
and others.**

Policies of insurance are not deemed, in their nature, incidents to the property insured; and do not cover any interest which a person other than the insured may have in the property, as heir, grantee, mortgagee or creditor, unless there be a valid assignment of the policy.

The contract of insurance, being a mere personal contract, in no way attached to or running with the real property insured, it does not pass with it, either to a grantee or an heir. The executor or administrator is the only one who can take the contract, and enforce it.

**A**PPEAL from a judgment ordered at a special term, after a trial at the circuit, before a justice of the court without a jury. The action was brought by the plaintiff, as administratrix of John R. Wyman, deceased, to recover certain insurance moneys which had been paid over to the defendant Prosser, to be held by him for the benefit of whoever should be decided to be entitled thereto. The court found the following facts: 1st. That John R. Wyman died intestate, January, 1859, and administration on his estate was granted to the plaintiff, 1850. 2d. That the defendants Harvey J. and Helen V. Wyman were his only heirs at law. 3d. That said John R., at the time of his death, owned certain real estate in Bath, on which was a hotel and other buildings, and was the owner of two policies of insurance thereon, issued to him, for the sum of \$1425 each, by the terms of which policies the loss or damage, if any, was payable to the insured, "his executors, administrators and assigns." 4th. That the policies were in full life at the time of his death. That on the 8th October, 1859, the insured property was destroyed by fire, and the loss adjusted at \$1425 on each policy, and a writing on said policies, duly signed by the insurers, agreeing to pay the same to the parties entitled thereto. 5th. That before the commencement of this action the insurance money, \$2850, was paid to the defendant Prosser, by the consent of the parties to this action, to be held by him, to be paid under the direction of this court to the respective parties to this action

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Wyman v. Prosser.

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to whom the court should determine the same to belong, &c. 6th. That the estate of said John R. was insolvent, and that William W. and George G. were creditors of the estate to the amount of \$7000. Upon which findings the court decided that the plaintiff, as administratrix, was entitled to the money, and gave judgment that the same be paid over to her with interest; the costs of the parties to be paid out of the fund. Judgment was duly entered December 11th, 1860, accordingly.

The following opinion was given by the justice before whom the cause was tried at the circuit :

E. DARWIN SMITH, J. "The policies of insurance upon which the money in controversy was received by the defendant, are both contracts in form with John R. Wyman, (the deceased,) his *executors, administrators or assigns*. If the fire had occurred in the lifetime of the insured and the loss remained unpaid, it would most undoubtedly be payable to the administratrix, and would be assets in her hands. The death of the insured cast the real estate upon the heirs, but the contract of insurance remained a *personal contract* with the executors, or else it terminated with the death of the insured. So far as the heirs are concerned they have no assignment of the policy, and unless it remains valid in the hands of the executors or administrators, no one I think could have enforced it. In Ellis on *Insurance*, 84 and 5, it is said of policies of insurance : 'If the covenant does not name the *heirs*, the executors of the insured and not the heirs will be entitled to the proceeds of the policy, and these proceeds will go to pay debts instead of being applied to rebuild houses,' &c. Hovenden, in 1st *Supp.* 305, says : 'Policies of insurance are not attached to the realty, nor do they in any manner go with the same as incident thereto by any conveyance or assignment,' and see *Mildmay v. Folgham*, (3 *Ves.* 471;) *Haxall, ex'r, v. Strippers*, (10 *Leigh*, 555;) *Distro v. Jones*, (1 *Har. Mich. R.* 56;) 1 *Phil. on Ins.* 104; 1 *Angell on Ins.*

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Wyman v. Prosser.

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403. These cases, I think, fully establish the law to be that the policy of insurance in this case did not pass to these heirs, but did pass to the executors and administrators, and could only be collected by them. The cases in *Vesey* and *Leigh* are precisely like this, in the fact that the fire occurred after the death of the insured, and the executors are held entitled to the insurance money. In the case in 4 *Bradford*, 117, the surrogate of New York held that the executor was the only person who could enforce the contract of insurance; the policy running like these in this case to the insured and his executors, administrators, &c. If the want of an insurable interest in the executors or administrators would in such a case be fatal to the right of recovery, the want of any assignment or transfer of the contract to the heirs, when heirs are not named in the policy, would be equally fatal. But in such case I think that the executors and the heirs should *both* be deemed to represent the estate for the purpose of sustaining the policy, and the money to be received on the policy would go for the benefit of the estate in payment of debts. The interest of the insured remaining in his heirs, I think, would be a sufficient interest to sustain the policy in the hands of the executors. It is like the case of a contract to sell lands; the title would go to the heirs, but the executors would take the contract and be entitled to recover the money due thereon if it remained in force. Both, in such case, represent the deceased; one taking the realty and the others the chattel interests.

Upon the force of these cases I must hold that the money belonged to the plaintiff as administratrix; but if it were otherwise, and the money be deemed real estate, I think equity would reach it as a substitute for real estate, at the suit of the administratrix in this case, for the payment of debts, the creditors being entitled to payment before the heirs could appropriate it to their own use; it appearing that the estate was insolvent, and that the insurance money and the land was insufficient to pay the debts."

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Wyman v. Prosser.

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Judgment was accordingly entered for the plaintiff, and the defendant made a case containing the exceptions, and appealed to the general term.

*D. B. Prosser* and *S. H. Welles*, for the appellants.

*C. G. Judd*, for the plaintiff.

*By the Court*, JOHNSON, J. Policies of insurance are not deemed, in their nature, incidents to the property insured. They are mere special agreements with the person insuring against such loss or damage as he may sustain. They do not cover any interest which another person may have in the same property, as heir, grantee, mortgagee or creditor, unless such other has a valid assignment of the policy. (*Carpenter v. The Providence Washington Ins. Co.*, 16 *Peters*, 495.)

The promise here is, in terms, to the assured, his executors, administrators and assigns. In just such a case as this, where the assured died, and the property insured descended to the heir, who had no assignment of the policy, and a loss happened afterwards, it was held that the loss was payable to the executor, and not to the heir. (*Mildmay v. Folgham*, 3 *Ves.* 472. *Angell on Ins.* 403, § 389.) The same rule is laid down by most if not all of the writers on the subject of insurance. Indeed, it results necessarily from the nature of the contract. It being a mere personal contract, in no way attached to, or running with, the real property insured, it does not pass with it, either to the grantee or the heir. The executor, or administrator, is the only one who can take it and enforce it.

The judgment must therefore be affirmed.

[MONROE GENERAL TERM, March 8, 1862. *Smith, Welles* and *Johnson*, Justices.]

GILBERT, receiver, &c. *vs.* THE PHOENIX INSURANCE  
COMPANY.

A stipulation, in a policy of insurance, that the insurance shall be void, in case the assured, or any other person with his knowledge, shall have existing, during the continuance of the policy, any other insurance on the property, not notified to the insurers and mentioned in, or indorsed upon, the policy, is a material part of the contract between the parties.

The parties to a contract of insurance have the right to stipulate between themselves, as to the nature and kind of evidence by which the assent of the insurers to other insurances shall be manifested. And when they have thus stipulated, the court has no power to substitute any other kind of evidence, differing in kind or degree.

Accordingly, a condition (made a part of the contract) that notices of all previous insurances upon the property shall be given to the insurers and indorsed upon the policy, or otherwise acknowledged in writing, at or before the time of making the insurance, otherwise the policy shall be void; and a similar condition in reference to subsequent insurances; together with a stipulation in the body of the policy that the insurance shall be void in case the insured shall have any other insurance on the property, during the continuance of the policy, not notified to the insurers and mentioned in, or indorsed upon, the policy, constitute a valid agreement; and the failure of the insured to have other insurances effected by him mentioned in, or indorsed upon, the policy, or acknowledged in writing, will render the policy void.

ONE Porter Kellogg was the owner in fee of a certain mill, at Nunda. In the latter part of December, 1857, he obtained from the defendants the policy of insurance on which this action is brought, dated January 1, 1858, insuring him against loss by fire on his mill to the amount of \$2000. In his application for such insurance he stated that there was no other insurance on the property. In the body of this policy it was agreed "that in case the assured, or any other person with the knowledge of the assured, shall have existing, during the continuance of this policy, any other insurance against loss by fire on the property hereby insured, and not notified to this company, and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect." By condition No. V, annexed to and referred to in the policy of insurance, it was agreed as follows: "Notice



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of all previous insurance upon property insured by this company shall be given to them, and indorsed on this policy or otherwise acknowledged by this company in writing, at or before the time of their making insurance thereon; otherwise the policy subscribed by this company shall be of no effect. And in case of subsequent insurance on property insured by this company, notice thereof must also, with all reasonable diligence, be given to them, to the end that such subsequent insurance may be indorsed on the policy subscribed by this company, or otherwise acknowledged in writing; in default whereof such policy shall henceforth cease and be of no effect." Immediately after making this application to the defendant's company he applied to the agent of the Hampden and the Conway insurance companies, at Rochester, and made an arrangement for a policy of insurance in each company, on the same property, for \$1500. These policies were issued immediately after January 1, 1858, and sent to Kellogg by mail. These policies were adopted by Kellogg. No notice was given to the defendant or its agent of these insurances, and of course none was indorsed on the policy. The property was destroyed by fire on the 6th day of May, 1858. The distance from Nunda, where the assured resides, to Hornellsville, the residence of the defendant's agent, is about 25 miles. In October, 1858, one Gleason, a creditor of Kellogg, the assured, commenced a suit against him in the supreme court of Connecticut, in which action the defendant was garnisheed. To avoid the annoyance of litigation, and without admitting any liability upon the policy, the defendant agreed to pay Kellogg \$1000 in compromise of the claim, and judgment passed that the defendant pay Gleason the said sum of \$1000, which it subsequently did. The plaintiff had notice of this proceeding, but failed to appear and contest Gleason's claim. By a judgment of this court, recovered July 23, 1858, in an action therein pending between Roswell G. Bennett and Robert J. Balty, plaintiffs, and Porter Kellogg, defendant, it was adjudged, among other things, by the said court,

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that the before mentioned policies of insurance were the property of said Balty and Bennett, to the amount of \$3000, and that a receiver be appointed to take and collect the said policies of insurance, and to pay into the said court, subject to its order, out of the moneys so collected, \$3000 and the costs of that action, and that the said Kellogg assign, transfer and deliver the said policies to such receiver ; which judgment was perfected in the clerk's office of Livingston county on the 6th day of September, 1858. This action was accordingly brought by the plaintiff, as such receiver, to recover the amount insured in the policy issued by the defendant. The cause was tried at the Livingston circuit, in January, 1861, before the Hon. E. DARWIN SMITH and a jury. The court directed a verdict for the plaintiff for \$2350, subject to the opinion of the court at a general term, upon a case to be made by the plaintiff.

*H. Chalker*, for the plaintiff.

*W. F. Cogswell*, for the defendant.

*By the Court*, JOHNSON, J. It was expressly stipulated in the body of the policy, that the insurance should be void in case the assured, or any other person with his knowledge, should have existing, during the continuance of the policy, any other insurance on the property, not notified to the defendant, and mentioned in or indorsed upon this policy. This was a material part of the contract between the parties.

The fifth condition, which is also a part of the contract, provides that notices of all previous insurances upon property insured by the defendant shall be given to it and indorsed upon the policy, or otherwise acknowledged in writing, at or before the time of making the insurance ; otherwise the policy subscribed by the company shall be void. In reference to subsequent insurances, the same condition provides that notice thereof must with all reasonable diligence be

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given to the company, to the end that they may be indorsed on the policy, or otherwise acknowledged in writing by it, and that in default thereof the policy shall thenceforth cease and be of no effect. It appears from the evidence, and was admitted by the plaintiff's counsel upon the argument, that in addition to the policy in question, the assured effected an insurance upon the same property, in two other companies, to the amount of three thousand dollars, and received policies of \$1500 from each, neither of which was notified to the defendant, nor mentioned in nor indorsed upon the policy in question, nor otherwise acknowledged by the defendant in writing. The parties have stipulated that this omission should render this policy void and of no effect, and I can see no way of avoiding such a result, if the defendant chooses to insist upon these provisions. They were obviously inserted for its benefit, and for a substantial purpose, and the assured having entered into the agreement, is not now nor is his assignee at liberty to say they shall not be available, if a breach is clearly established on his part.

The policies all took effect on the first of January, 1858. The policy in question had been applied for, and the application was pending, when the assured made arrangements with the two other companies, in pursuance of which policies were issued and forwarded to him by mail. It does not appear which policy was first received and accepted by the assured. It is insisted by the plaintiff's counsel that the insurances effected in the two other companies were neither previous nor subsequent insurances to the policy in question, but contemporaneous with it, and therefore do not fall within the terms or scope of this policy. But it will be seen that the policy in question provides not only against insurances effected prior, and subsequent, to that in question, but also to those existing during the continuance of the policy in question, embracing every possible case of an insurance, whenever or however effected, which should have an existence, as such, within the period covered by this policy. There is some evi-

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dence tending to prove that the agent or person through whom the application for the insurance in question was made, to the defendant's agent, and through whom the assured received this policy, had verbal notice that the assured had made arrangements for one or both the other policies, before the one in question was issued. It does not appear, however, that this person had any authority to act for the defendant in any way, to affect or vary the written agreement. But if he had been the regularly constituted agent, with authority to receive applications and issue policies, and had issued the policy in question, after the verbal notice shown by the evidence, it could not affect the question of a breach, by reason of not having such insurances mentioned in, or indorsed upon, the policy, or otherwise acknowledged in writing.

The parties had clearly the right to stipulate between themselves, as to the nature and kind of evidence by which their assent to other insurances should be manifested. And where they have thus stipulated, the court has no power to substitute any other evidence, differing in kind or degree. To do this would be to make a new contract, which peradventure the parties themselves would never have made. The court is to enforce contracts which the parties have made, but has no power to make new contracts for them, or to alter or vary in any essential particular those they have mutually agreed to be bound by. That this matter, of the kind and degree of evidence by which the assent of the insurers to other insurances upon the same property shall be established, is no mere matter of form or ceremony, but of vital importance, will be readily conceded by every one who has been much in the practice of determining disputed questions of fact upon conflicting testimony. The uncertainty of even the most tenacious memory, the liability to misunderstand and the difficulty of reporting accurately, after a lapse of time, a mere verbal communication, are matters of every day's observation, and it is not at all surprising that parties should pro-

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vide for more certain and reliable evidence of important and controlling facts in their contracts.

That such an agreement is valid, and the policy rendered void, by failing to have other insurances mentioned in, or indorsed upon, the policy, or acknowledged in writing according to the terms of the contract, is now, I think, well settled by authority. (*Bigler v. The New York Central Ins. Co.*, 22 *N. Y. Rep.* 402. *Jube v. The Brooklyn Fire Ins. Co.*, 28 *Barb.* 412. *Basset v. The Union Mutual Fire Ins. Co.*, 7 *Cush.* 175. *Forbes v. The Agawam Mutual Fire Ins. Co.*, 9 *id.* 470. *Worcester Bank v. Hartford Fire Ins. Co.*, 11 *id.* 265. *Hale v. Mechanics' Mutual Fire Ins. Co.*, 6 *Gray*, 169. *Carter v. The Providence Washington Ins. Co.*, 16 *Peters*, 495.)

On this ground, alone, the defendant is clearly entitled to judgment, for its costs of the action.

Ordered accordingly.

[MONROE GENERAL TERM, March 3, 1862. *Johnson, Smith and Welles*, Justices.]

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 CRAIG vs. WARD and CLARK.

When it appears that the defendant was not, and could not have been, misled by a variance between the complaint and the proof, the variance may be disregarded, without amendment.

An action was brought by R. against W., C. and others, to have a mortgage, executed by D. to W., decreed void on the ground that it was fraudulent and invalid, and to have the premises therein described sold and the avails applied in satisfaction of a mortgage held by R. During the pendency of that action, Craig became the purchaser and assignee of the said mortgage, and brought this suit, against W. and C. to recover damages for false and fraudulent representations made by W. and C., by which he was induced to purchase the D. mortgage of them. *Held* that Craig having become the purchaser of the mortgage during the pendency of the action brought by R. became bound and concluded by the judgment therein, the same as though he had

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been a party to the record, as a co-defendant with W. and C. That in regard to the subject matter of both actions he stood in legal privity with W. and C., and the questions in respect to the validity or invalidity of the mortgage, by reason of the fraud, were identical.

Accordingly *held* that the judgment record in the suit brought by R. was legitimate evidence, in the present suit, for the purpose of establishing the fraud, and its effect upon the validity of the mortgage as a lien or incumbrance upon the land.

But that this being an action for fraud, Craig was bound to prove, by other evidence, that W. and C. practiced a fraud upon him, in the transfer of the mortgage.

A party making a representation false in fact, renders himself liable, in an action for fraud, although he did not actually know the representation to be false, at the time.

If a party makes a material representation, without knowing whether it is true or false, and it turns out to be false, an action lies for the fraudulent misrepresentation.

ON the 24th of September, 1855, the defendant Ward assigned to the plaintiff, by a writing under seal, a bond and mortgage executed to Ward by Elisha P. Davis, dated the 6th of that month, conditioned to secure the payment of \$2000 in five years from date, with interest semi-annually—the mortgage covering about 120 acres of land in Clarkson, Monroe county. The plaintiff paid \$1500 therefor, by two checks, one in favor of the defendant Clark for \$800, the other in favor of the defendant Ward for \$700. The plaintiff was applied to, to purchase the bond and mortgage by the defendant Clark, who professed to act in behalf of Ward, and who, after the purchase was agreed upon, delivered the assignment to the plaintiff, and received the checks for the consideration. In the negotiation for the sale, Clark represented to the plaintiff that the mortgage “was a bona fide mortgage, well secured, as straight as a string—there was no usury or other legal defense to it;” that “Ward had advanced \$2000 for it;” “that Davis had a clear title to the land, and this was the first incumbrance;” “that the mortgage was all right and straight in every particular; that it was the first mortgage.” In the written assignment, the defendant Ward covenanted that there was unpaid on the bond and mortgage

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\$2000, and interest from date ; and that there was no usury or other defense in the mortgage ; and certified that he paid to Davis the whole consideration, \$2000, and had good right and lawful authority to sell the same. The plaintiff believed the representations to be true, and was induced by them to purchase the bond and mortgage. The only title which Elisha P. Davis had or claimed to the mortgaged premises, was acquired by his purchasing the premises at a sale on a statute foreclosure, by advertisement, of a mortgage thereon, executed by Henry Leiter to Conrad B. Lewis on the 6th of April, 1850, and by Lewis assigned to Stephen Merritt, and by Merritt to George T. Davis, in whose name the foreclosure proceedings were conducted. The sale was on the 18th of August, 1855, Elisha P. Davis becoming the purchaser at \$455. The value of the premises was then \$5400. There were several mortgages on the premises, subsequent to the Leiter mortgage, at the time of the mortgage sale.

On the 7th day of September, 1855, Elizabeth M. Rathbone, who held a mortgage on the premises executed the 7th of March, 1854, for \$1600, commenced an action in this court, to have the mortgage sale under the Leiter mortgage, and the mortgage by Elisha P. Davis to the defendant Ward, declared fraudulent and void, and to foreclose her mortgage, making George T. Davis, Elisha P. Davis, and the defendants in this action, and others, parties defendants. The complaint in that action was filed in the clerk's office of Monroe county, and the summons was served on the defendants in this action on the 7th of September, 1855. The defendants in this action put in their answers in the action last aforesaid ; and the issues were referred to a referee for trial and decision. The referee reported that the sale under the Leiter mortgage was void for defects in the proceedings for the sale ; also for fraud, to which the defendant Clark, George T. Davis and Elisha P. Davis were parties ; that the mortgage of Elisha P. Davis to the defendant Ward was without consideration and fraudulent. This action was commenced

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the 23d of November, 1859, to recover damages for the fraud of the defendants in the sale to the plaintiff of the Davis mortgage.

It was proved at the trial that Elisha P. Davis was insolvent when the action was commenced.

The plaintiff, to show that the mortgagor had not a good title, and that the mortgage was not a lien, gave in evidence the report of the referee and the judgment founded thereon in the action brought by Elizabeth M. Rathbone against William Stebbins, the defendants in this action, and others. The defendants objected to the introduction of this report and judgment roll, which objection was overruled by the court; and the court held that the record was conclusive evidence of the facts directly adjudicated thereby or necessarily involved in the determination thereof. That all the facts found by the report of the referee were conclusively established as against the defendants in this action, and that it was conclusive evidence in this action that the bond and mortgage were void for want of consideration. The defendants' exceptions to the admission of this evidence, and to the ruling of the court as to the effect of it, formed one class of exceptions on which the defendants relied for a new trial.

The court charged the jury that if they should find for the plaintiff they would find the sum of \$1500, with interest from January 1st, 1859, the interest having been paid to that time. This was also excepted to, and these exceptions constituted another ground of the motion for a new trial. The court charged the jury, among other things, as follows: That although the plaintiff could not recover in this action on the covenant contained in the assignment, alone, he could, by showing that the same was untrue at the time when made, and known to be so by the defendants. To which charge the counsel for the defendants excepted. The court further charged the jury, that if the representations made to the plaintiff were untrue, although the defendant Ward did not know they were so, yet if he was informed and knew of facts



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which, in the exercise of common sense and ordinary prudence, were sufficient to put him upon inquiry, and would have led him to a knowledge of the condition of the title, he would be liable, the same as if he had actual knowledge. To which charge the counsel for the defendant Ward excepted.

The jury rendered a verdict for \$1723.13, and the court ordered the motion for a new trial to be heard at the general term in the first instance.

*T. R. Strong*, for the plaintiff.

*W. F. Cogswell*, for the defendants.

*By the Court*, JOHNSON, J. The action is brought to recover damages for false and fraudulent representations made by the defendants to the plaintiff, by which he was induced to purchase of them a certain bond and mortgage executed by one Davis, on the 6th of September, 1855.

The first question raised by the defendants' counsel is upon the exception to the ruling at the trial admitting the evidence of the representations of the defendant Clark that the mortgage was a bona fide mortgage well secured, and that the mortgagor had a clear title to the land, and this mortgage was the first lien, and that there was no usury or other defense to it. This evidence was objected to by the defendants' counsel on the ground that there was no averment of any such representation, in the complaint, and the evidence was therefore immaterial and incompetent. This raises simply the question of variance between the pleadings and proof. This particular misrepresentation is not specifically alleged in the complaint. The complaint, on this subject, avers, that the defendants stated and represented "that the said mortgage was a good and valid security in the hands of said defendant William H. Ward," and "that there was no usury therein or other defense thereto." This is a variance which might have been material under the former system of

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practice, but cannot be regarded as such under the code. No variance between the allegation in a pleading, and the proof, can now be deemed material, unless it have actually misled the adverse party, to his prejudice. (*Code*, § 169.) When it has not thus misled, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. (*Id.* § 170.) And this applies to all actions and defenses. (*Catlin v. Gunter*, 1 *Kern*. 368.) When it appears that the party was not, and could not have been thus misled, the variance may be disregarded without amendment. (*Bennett v. Judson*, 21 *N. Y. Rep.* 238. *Harmony v. Bingham*, 1 *Duer*, 209.) This I think necessarily results from the provisions of the code. There is nothing in the case to show that the defendants have been misled by this evidence, to their prejudice. It was directly in support of the cause of action alleged, to wit, fraudulent misrepresentations in regard to the subject of the sale. It is not a case of failure of proof, of the cause of action, provided for by § 171 of the code.

A more important and difficult question arises upon the question of the introduction of the judgment record in evidence, in the action between Eliza M. Rathbone, plaintiff, and these defendants, and others, who were also defendants, for the purpose of establishing the matters therein determined. The object of that action, as appears by the record, was to have the mortgage in question decreed void on the ground that it was fraudulent and invalid; and to have the premises described therein sold, and the avails applied in satisfaction of the plaintiff's mortgage. The plaintiff became the purchaser and assignee of the mortgage in question, during the pendency of that action, and thus became bound and concluded by the judgment, the same as though he had been a party to the record. (*Harrington v. Slade*, 22 *Barb.* 161. *Sedgwick v. Cleveland*, 7 *Paige*, 287. *Cook v. Mancius*, 5 *John. Ch.* 89. *Edwards on Parties*, 79.) He stood the same as though he had been actually a co-defendant, with

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these defendants, in that action. They were all concluded by the judgment in that action, as between them and the plaintiff, and all persons claiming under the plaintiff by title subsequent. But the question here arises whether the judgment in that action is conclusive between the defendants in it, in another action between themselves, involving the same matters there adjudicated. I think there can be no doubt that it is so, as far as the matter in the two actions is identical, upon well established principles, although I do not find that the precise question has ever been directly presented and adjudicated. A familiar case is that of an action brought by a third person against the vendee of a chattel, claiming title. If the vendor appears and defends, or if the vendee gives him notice so that he has the opportunity to do so, the judgment against the vendee is conclusive in an action by the latter against his vendor, on the implied warranty of title, although the vendor was no party to the action. And the rule is the same in regard to all persons who stand in such a relation to each other that the matters determined in an action brought by a third person against one, will necessarily again come in question, in proceedings between him and the other, as vendees, assignees, grantees, sureties, persons acting under an agreement for indemnity, and the like. (*See American notes to Duchess of Kingston's case*, 2 *Smith's Lead. Cas.* 552, 553, and cases there cited.) It is not necessary that the parties should be the same, in the second action, or that they should occupy the same relative positions, of plaintiff and defendant, as in the former action, or that the form of action should be the same. The test is whether the party against whom the former judgment is sought to be used was, or had an opportunity of being heard, and the matter litigated is the same, and the parties are in privity as to such matter. (*Castle v. Noyes*, 14 *N. Y. Rep.* 329. *Doty v. Brown*, 4 *Comst.* 71. *Kingsland v. Spalding*, 3 *Barb. Ch.* 341. *Embury v. Conner*, 3 *Comst.* 511. *Ehle v. Bingham*, 7 *Barb.* 494. *Cowen & Hill's Notes*, 824, 975.) It is unnecessary to multiply

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authorities upon a rule so well established. It cannot be denied that the plaintiff in regard to the subject matter of both actions, stands in legal privity with the defendants. And it seems to me equally clear that the questions in respect to the validity or invalidity of the mortgage in question, by reason of the fraud, are identical. The question of the fraud, and its effect upon the validity of the mortgage as a lien or incumbrance upon the land, was then tried and determined, and that precise question is in litigation here. It may be that the record, when introduced, established only one fact, which the plaintiff was required to prove, in order to maintain his action, but to whatever extent it went as an adjudication on the questions here tried, the plaintiff was entitled to the benefit of it, on this trial.

This being an action of fraud, the plaintiff of course was required to prove, in some way, that the defendants practiced a fraud upon him, in the transfer; and this fact the record itself would not establish, because that fraud was not litigated in the other action. But I do not understand from the case that it was introduced for that purpose, or that any such effect was given to it as evidence. The representations were made out by other evidence, and the previous fraud only, and consequent invalidity of the mortgage, established by the record. For this purpose and to this extent it was strictly legitimate. This was the matter directly adjudicated, and necessarily involved, in the determination in that action, and that was the only effect the judge gave to it in his charge. This covers both the exception to the admission of the evidence, and to the charge of the judge on the subject of its conclusiveness, neither of which was well taken. Had the representations proved been contained in the covenant in the assignment, and the action been brought on the breach of the warranty, there can be no doubt, I think, that the record would have been entirely conclusive as evidence of the breach. It is no less conclusive in this action as to the fact that the representations were untrue. The form of the ac-

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tion does not affect the competency of the evidence, if the fact it establishes is pertinent, nor its conclusive character in regard to such fact. The action for fraud can be maintained for a false representation in a written instrument, as well as for one made verbally, and there is nothing in the exception to that part of the charge.

The exception to that part of the charge as to the liability of the defendant Ward, if the representations were untrue, although he did not know they were so at the time, but knew facts which in the exercise of ordinary sense and prudence would have led him to such knowledge, is not well taken. It does not involve the proposition of his liability, in case he actually believed the representations to be true at the time. It carefully excludes that fact, and only raises the question as to whether a party making a representation false in fact, should actually know it to be so, to render himself liable, in an action for fraud. That he is liable, or may be, in such a case, is fully established by the decision in *Bennett v. Judson*, (21 N. Y. Rep. 238,) before cited.

Besides, in this case, the defendant Ward was bound, not only by the representations, but by the knowledge of their falsity, of his agent Clark, who made most of them. If a party makes a material representation, without knowing whether it is true or false, and it turns out to be false, the action lies for the fraudulent misrepresentation.

In respect to the charge on the subject of the measure of damages, conceding it to be erroneous, it is difficult to see how it can be pretended that the error was prejudicial to the defendant. There is nothing in the case to show that the verdict could have been less, had the rule now insisted upon by the defendants' counsel been laid down by the court as the true measure of damages. On the contrary, there is every reason to suppose it would have been much larger. The exception is of the most general character; and no request was made to the court to give any different instructions on that subject. If the error was beneficial to the defendants, the

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exception is unavailing; and as nothing is shown or suggested by the defendants' counsel that it was, in fact, or could have been otherwise, it will not be presumed that it was so.

On the whole, I am satisfied that there was no material error committed, either in the charge or in the rulings during the progress of the trial, or in the refusal to charge as requested by the defendants' counsel. A new trial must therefore be denied.

[MONROE GENERAL TERM, March 8, 1862. *Johnson, Smith and Welles*, Justices.]

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ROSSEEL vs. WICKHAM.

A grantee, by accepting a deed containing an exception of certain lands previously sold and conveyed to another, and then entering into the possession of the lands thus excepted, will be deemed in law to have entered in subserviency to the title of the grantee of the excepted land, and to continue to hold in subserviency thereto; unless he can establish the contrary, by some clear and unequivocal act or claim of title in himself.

Thus, where W., in 1812, took a conveyance from L. of certain lands therein described, in which other lands were excepted, and the fact recited that the lots thus excepted had been previously sold and conveyed to B., and W. went into possession of the lands so conveyed, and of the lots excepted, at the same time, and occupied them from 1812 to 1860; *Held* that although W. had been in possession of the excepted lots for more than twenty years, his entry was not hostile to the title of those claiming under B., and his possession was not adverse to theirs, so as to bar a recovery of the possession of the lots, in ejectment.

**A** PPEAL from a judgment ordered for the plaintiff at the circuit, after a trial before the court without a jury. The action was for the recovery of the possession of real estate. The justice before whom the action was tried found the following facts and conclusions of law: John Hornby, by deed bearing date November 6, 1804, conveyed to William N. Lummis a tract of land lying at Sodus Point, embracing the premises demanded in the complaint, who thereupon

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went into possession and occupied the premises conveyed by said deed. William N. Lummis, by deed dated July 7, 1810, conveyed certain of the lands in the above mentioned deed described, covering, with other lands, the premises demanded in the complaint in this action, to Henry P. Borrekens. The said Henry P. Borrekens, by his certain indenture of mortgage, bearing date March 5, 1811, conveyed the said premises, to him conveyed by William N. Lummis, to David Parish. The mortgage was conditioned for the payment by Borrekens to Parish of the sum of \$4500 with interest, on or before the first day of December then next. This mortgage was recorded in Ontario county on the 11th of March, 1811. Borrekens, by deed bearing date December 30, 1815, released and quit-claimed to the said David Parish the premises described in the mortgage, including the premises described in the complaint in this action. The said release was acknowledged on the day of its date, and recorded in the clerk's office of Ontario county on the 16th day of July, 1822. By chapter 2 of the laws of 1808, David Parish, a native of Hamburgh, was enabled to purchase any real estate within this state, and to hold and dispose of the same in like manner as a natural born citizen. David Parish was the son of a British subject, resident in Hamburgh, where said David and several brothers and sisters of said David were born, (none of whom were ever in this country except George, a brother of said David,) whose names are John, Richard, George, Charles, Harriet and Elizabeth. David, having never been married, died leaving his said brothers and sisters living near Vienna, Austria, in 1826, having made no will. George Parish, the brother of David, came to this country to reside in 1815, and continued a resident of this state until his death, which took place in April, 1839, at Paris, France. By chapter 243 of the laws of 1817, the said George Parish was enabled "to take real estate within this state, either by descent or purchase, and to hold and dispose thereof in like manner as a natural born citizen." George Parish, by will bearing date



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August 10, 1827, proved and established as a will of both real and personal estate by and before the surrogate of the county of St. Lawrence, in July, 1839, gave, devised and bequeathed unto Joseph Rosseel, the plaintiff in this action, all his property and estate, whether real or personal. That defendant, at and before the service of the summons and complaint in this action, declared he was in possession of the premises demanded and described in the complaint, and declared that he thought he bought them of William N. Lummis. Lummis, by deed bearing date the 8th day of September, 1812, conveyed to the defendant Wickham certain premises therein described, the boundaries whereof include the premises in question, and containing an exception of the premises in question, reciting that the said excepted lands had been sold to Henry P. Borrekens, by deed bearing date the 7th of July, 1810. That the defendant, by deed dated and recorded in said county of Ontario on the 22d day of August, 1825, conveyed to Thomas Shipley the same premises as aforesaid conveyed by said Lummis to the defendant, with the same exceptions and recital. That said Shipley, by deed dated the 2d day of 10th month, 1833, and recorded in said county 29th May, 1837, reconveyed to the defendant the same premises, with the same exceptions and recital. That when the defendant purchased from Lummis the said lots, numbered seven and ten, separated by Antwerp street, as also said Antwerp street which was never opened, were inclosed in the same lot with the premises conveyed to the defendant, and that he had used and occupied the whole since 1812. That the other lots were fenced in by the defendant about the year 1830, and have been since then occupied by him. That by virtue of the several conveyances and will, the plaintiff became and now is seised in fee simple of the premises described in the complaint. That the defendant is now in possession thereof, and has been for more than twenty years previous to the commencement of this action, but that the entry of the said defendant was not hostile



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to the plaintiff. That the defendant, within the said twenty years, has recognized the title of the plaintiff, and such entry of the defendant was not made under such claim or color of title as constitutes an adverse possession. And, therefore, that the plaintiff was entitled to a judgment that he recover the possession of the premises.

The defendant excepted to the decision of the justice, and appealed from the judgment.

*S. K. Williams*, for the appellant.

*Geo. G. Munger*, for the respondent.

*By the Court*, JOHNSON, J. The question whether George Parish took the premises in question by inheritance, as the heir of his brother David, is settled in the plaintiff's favor by the decision in *Parish v. Ward*, (28 Barb. 328.)

The only question, of any considerable importance, in the case, to be considered, is, whether the defendant has held the premises for twenty years, or more, last past, adversely to the plaintiff's claim of title.

The court, before whom the cause was tried, without a jury, has found as facts from the evidence, that the defendant, in 1812, took a conveyance from William N. Lummis of certain lands therein described, in which the lands in question were excepted, and the fact recited that these lots thus excepted had been sold and conveyed to Henry P. Borrekens by deed bearing date the 7th July, 1810. That the defendant went into possession of the lands so conveyed, and of the lands in question thus excepted from his conveyance, at the same time, and has occupied these lands ever since 1812. That the defendant, on the 22d of August, 1825, conveyed to Thomas Shipley the same premises granted to him by Lummis, by deed, which contained the same exceptions and recital as to the premises in question. And that Shipley, in October, 1838, reconveyed to the defendant the same premises, with the same exceptions and recital. The court further

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finds that the defendant is in possession, and has been for more than twenty years, but that his entry was not hostile to the plaintiff's title. Upon these facts it is impossible to hold as matter of law that there has been such a holding by the defendant as to bar the plaintiff's right of entry under his title, which is clear and undisputed, so far as it rests in conveyance from the real owner. It seems to me entirely clear that the defendant by accepting such a deed, and then entering into possession of the lands therein excepted, and declared to have been conveyed by his grantor to another, must be deemed in law to have entered in subserviency to the title of such other, and to continue to hold in subserviency thereto ; unless he can establish the contrary by some clear and unequivocal act or claim of title in himself. (*Fosgate v. Herkimer Manuf. and Hydraulic Co.*, 9 Barb. 287 ; *Same v. Same*, 12 id. 352.) The seisin of a party once established is deemed to continue, although he leave the premises vacant, and another enters thereon.

Under our statutes, possession is not deemed adverse, unless the occupant entered under claim of title, exclusive of any other right, founding such claim upon some written instrument, as being a conveyance of the premises, or upon the decree or judgment of some competent court. (2 R. S. 294, § 9. Code, § 82.) In all other cases the occupation is presumed to have been under the legal title, where one is established. (2 R. S. 293, § 8. Code, § 81.)

There is no pretense here that the defendant entered under any written conveyance of the land in question, or by virtue of any judgment or decree of any court. He was a witness upon the trial, in his own behalf, and makes no such claim. He does, however, pretend that he supposed he had purchased of Lummis the land in question, at the same time he bought the land described in the deed. But this is so utterly at variance with the deed he received from Lummis, and with his own deed to Shipley, that the court might well find as matter of fact from the evidence, that his entry was not hostile

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to the plaintiff. He does not pretend to claim that the paper, which he says he received from Lummis to protect his possession against Borrekens, was in the nature of either a conveyance, or a contract to purchase. Indeed the defendant has so repeatedly and in such formal and solemn manner recognized and acknowledged the title under which the plaintiff claims, from the time of his first entry, that he ought now to be concluded, and estopped from disputing it. And such is the rule as between the defendant and his grantor and those claiming under the latter, in regard to the mere question of title, as evidenced by the recitals in the defendant's deed. (*Demeyer v. Legg*, 18 Barb. 14. *Torrey v. Bank of Orleans*, 9 Paige, 649. *Sinclair v. Jackson*, 8 Cowen, 586. *Carver v. Jackson*, 4 Peters, 83, 86.) The recital of a fact in a deed is evidence against the grantee, and the acceptance of the deed operates as an estoppel upon him and those who claim under him, as against the grantor and his assigns. It is unnecessary, however, to invoke the aid of this doctrine in this case, and indeed it is not strictly applicable to the case of a real claim of title by adverse possession. It bears, however, to a certain extent, upon the questions of the character of the defendant's original entry, and subsequent possession, and aids in determining the facts in regard to such entry and possession. Upon the whole, I am entirely satisfied that the learned judge at the circuit was right in the conclusion that the defendant's possession has never been adverse to the plaintiff's title.

The judgment must therefore be affirmed.

[MONROE GENERAL TERM, March 8, 1862. *Johnson, Smith and Welles*, Justices.]

**PAIGE, Chamberlain, &c. vs. FAZACKERLY.**

Actions by public officers, as such, should be brought in their individual names, with the title of their office added.

If, in an action brought by one as "chamberlain, &c.," no objection is taken, on the trial, that the plaintiff is not chamberlain, it will be *assumed*, on appeal, that the fact of his being the incumbent of the office was understood, or taken for granted.

When it is obvious that a fact was assumed, on the trial, it is as much in the case as if it were expressly proved.

If a party acquiesces in a course of proceeding which assumes the existence of a fact, he will be deemed to have admitted it; and the fact will be treated, on appeal, as beyond the reach of any objection not made on the trial.

When a court of review is satisfied, from the general scope and tenor of the proceedings on the trial, that a particular fact was not a matter of contest, nor a ground of objection there, but was assumed, or taken for granted, in the conduct of the cause, it may and should conclude that the fact was as it was assumed to be.

**A**PPEAL by the plaintiff from a judgment of the county court of Albany county, reversing a judgment recovered by the plaintiff in the justice's court of the city of Albany, for a penalty of \$25 for selling bread of defective weight. The proceedings were commenced by warrant served on the defendant, which required him to answer the plaintiff "for a penalty of \$25, or under, for violating an ordinance of the city of Albany, on the 24th day of September, 1860, viz. for manufacturing for sale as a baker 100 loaves of bread of defective weight." The warrant was indorsed as being issued on a charge of violating an ordinance of the common council of the city of Albany, entitled "of the manufacture and sale of bread." The defendant was brought into court, and the complaint was then presented "against the defendant for manufacturing, as a baker of said city, bread for sale of defective weight, viz. 100 loaves, upon the 24th September, then instant, and in violation of an ordinance and law of the common council of said city, entitled a law to amend chapter 2 of the city laws entitled 'of the manufacture and sale of bread.'" The defendant denied the complaint. The case

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was adjourned, and subsequently proceeded with, in the presence of both parties and their counsel. A witness for the plaintiff testified that he knew the defendant; that he was a baker in Elm street; that witness went to his bakery on the 24th of September and weighed 105 loaves of bread just taken out of the oven, and that 100 of them fell *short of weight*, varying from half an ounce to three ounces. The defendant moved for a nonsuit, for these reasons, viz: 1. "That the court had no jurisdiction of the person or subject matter. 2. The action is improperly brought. 3. No violation of law is shown. 4. The proof does not show that the bread was not made into loaves in accordance to law. 5. The law under which the proceedings are taken is unconstitutional and void." The motion being denied, the defendant gave evidence tending to show that the bread was properly scaled, made of other flour than usual, and that it would *dry out*, more or less. The testimony being closed, the cause was argued, and the justice gave judgment for the plaintiff, and against the defendant, for \$25 penalty and costs. The defendant appealed to the county court, where the judgment was reversed, and the plaintiff appealed to this court.

*Clinton Cassidy*, for the plaintiff, (appellant.)

*O. M. Hungerford*, for the defendant, (respondent.)

*By the Court*, HOGEBOM, J. There is nothing before this court to show upon what ground the county court reversed the justice's judgment; but the defendant's counsel now makes these objections to the recovery before the justice: 1. That the plaintiff was bound to show the city ordinance before he could recover. 2. That he was also bound to show that the defendant was a baker in the city of Albany. 3. That there was no statute authorizing the chamberlain to sue for the penalty; and if there was a city ordinance, it should have been proven—as also that Paige was chamberlain. 4. That

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the action should have been brought in the name of "the chamberlain of the city of Albany," and not in the name of Paige as such. 5. That the evidence did not show a violation of the ordinance. 6. That the ordinance was unconstitutional and void.

It is safe to say that at the trial none of these objections were properly taken, except the *last*, which is now not strenuously urged. There is no doubt that a city ordinance regulating the weight of bread is a valid police regulation. (*Laws of 1842, ch. 275, § 29. Tanner v. Trustees of Albion, 5 Hill, 121. Mayor of New York v. Williams, 15 N. Y. Rep. 502.*)

It is true that, in the motion for a nonsuit, it was urged that no violation of law was shown; but that raises no question whatever, any more than the general issue, or a claim that the plaintiff is not entitled to recover. It presents no specific point—nothing precise or definite upon which the mind of the court or the opposing counsel could act.

It was also urged that there was no proof that the bread was not made into loaves in accordance to law; which is but reiterating the same objection in a little different language. It conveys no idea of the specific objection designed to be urged, nor of any particular defect in the plaintiff's case. The plaintiff had without objection shown that the loaves were "short of weight;" that is, as we must assume, short of the lawful or prescribed standard of weight; and this, on the question of fact, made a *prima facie* case. If the defendant, under cover of this objection, meant to urge that the ordinance had not been proved, his language was ingeniously contrived to conceal his idea; and it would be a fraud upon justice to allow it to cover such an objection. The 5th ground of the motion for a nonsuit was, that "the law under which the proceedings are taken is unconstitutional and void." The law was therefore before the court, or its existence and provisions *assumed* to be known.

So the defendant urged that the action was improperly

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brought; but *why*, or for what reason, was not alleged. It does not sufficiently point out that the intended reason was because the chamberlain was not the proper party to bring it. If it did, the objection was untenable, for he is declared by statute to be the proper person to sue for penalties.

Nor does it indicate that the point of the objection was, that the suit should have been brought in the official name of the incumbent of the office. If it did, the objection was untenable; for it is settled that it should be brought, as in this case, in the individual name of the incumbent, with the title of his office added. (*Supervisor of Galway v. Stimson*, 4 Hill, 136. *Commissioners of Cortlandville v. Peck*, 5 id. 215. *Agent of Mount Pleasant Prison v. Rikeman*, 1 Denio, 279. *People v. Commissioners of Highways of Seward*, 27 Barb. 97.)

Nor was the objection taken that Paige was not chamberlain; and it must be *assumed*, therefore, that that was understood, or taken for granted. There is some reason for saying that his official title and character stood admitted by the pleadings, by not being specifically denied. But whether this be so or not, it was plainly not a matter of contest, nor a ground of objection at the trial, and it was assumed or taken for granted in the conduct of the cause. This a court of review may and should conclude was the case, when they are satisfied of it from the general scope and tenor of the proceedings. Nor is it an unjust conclusion or assumption, for it is in accordance with fairness and justice, and with the uniform tendency of judicial decisions, (with which we must presume parties to have been acquainted.)

The same remarks are applicable to the objection now *first* made, that it was not shown that the defendant was a baker of the *city of Albany*. It was shown he was a baker in Elm street; and it is not denied that there is such a street in Albany; the proceedings were commenced there; the trial was had there; and it would be an outrage upon common sense, as well as common justice, to suppose that in speaking of

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Elm street reference was intended to be made to Elm street in the city of New York, or Philadelphia. When it is obvious that a fact was assumed on the trial, it is as much in the case as if it were expressly proved.

I think the same considerations dispose of the point, principally urged on the argument, and, so far as appears, never before suggested in the whole course of the proceedings, that the plaintiff did not produce or prove the ordinance under which the right to recover the penalty was claimed.

It is undoubtedly true that the existence of such an ordinance was vital to the plaintiff's case, and should either have been proved or admitted on the trial; that is, admitted by the direct concession of the party, or by his acquiescence in a course of proceeding which assumed the existence of the ordinance. I think the defendant is in the latter predicament. The course of proceeding justifies us in concluding that the parties knew of the ordinance, and tacitly conceded its existence. Probably it was before the court in the book of city ordinances. It is reasonable to presume that the parties acted upon the assumption of such an ordinance. The warrant and the complaint both made direct and specific reference to it; the plaintiff's evidence referred to it by the use of the term "short weight;" its non-production was not in the remotest degree suggested at the trial; the defendant's evidence was directed to proof tending to disprove the *deficiency of weight*, and in that way the non-violation of the ordinance; not a point or objection was raised in regard to it; and with evenhanded justice to all parties, I think we may safely conclude that the existence of the ordinance was taken for granted.

It may not be unprofitable to refer to a few of the leading cases in our own reports, where facts apparently assumed at the trial are treated as beyond the reach of any objection not made in the original tribunal.

In *Baldwin v. Calkins*, (10 *Wend.* 167,) an objection was made on certiorari that the proceedings for the assessment



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of damages under a special act, which required such assessment to be made by three judges of the Onondaga common pleas *not interested in the land*, did not show that the judges were *disinterested*; but the court held that as the adverse parties were notified, and made no objections to the judges, their competency was thereby assumed or admitted. (*Pages 174, 175.*)

In *Jackson v. Robert's ex'rs*, (11 *Wend.* 422,) the point was considered in the opinions of two of the senators, and it was maintained that where it appears from the bill of exceptions that on the trial of the cause certain positions of law were contended for by one of the parties *on the assumption of certain facts*, and the circuit judge, on the same assumption of facts, decides the law against such party, who excepts to the decision and moves for a new trial, the supreme court, on the motion for a new trial, are warranted in considering the facts *as appearing* in the bill of exceptions.

In *Mann v. Eckford's ex'rs*, (15 *id.* 510,) it became necessary for the plaintiff to show that the Western Insurance Company had title to the bond and mortgage of one Gibbons; and one of the grounds of the motion for a nonsuit was that such proof had not been given. In the argument at bar, under cover of this objection, it was urged, 1. That the company had no *power* to take this bond and mortgage; and 2. That the transaction was illegal and void, as having taken place at an office of the company in *New York*. The court refused to give any countenance to the objection, and remarked, "the party is not at liberty to make general objections at the circuit, and then seek to overturn the decision of the judge upon grounds which were not distinctly presented to his mind."

In *Doane v. Eddy*, (16 *id.* 525,) the defendant justified the taking of personal property under an attachment issued against the plaintiff's mortgagor, pursuant to the laws of the state of Vermont. On the argument at bar, to set aside the

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nonsuit, the plaintiff took the point that the defendant had not shown himself a *creditor* of Julius Doane, the mortgagor, nor shown the *regularity* of the proceedings under which the attachment issued, according to the laws of Vermont; but the court held that these points were unavailable, not having been made at the trial.

In *Patterson v. Westervelt*, (17 *Wend.* 545,) the action was for an escape, and the court say: "It was said by the defendant's counsel, on the argument of this case, that no escape was proved at the trial. The evidence was truly very slight, but the judge and parties assumed it as sufficient, and no such point was made at nisi prius. Had it been, further proof would doubtless have been given; perhaps indeed it was given, but omitted in making up the case, because there was no objection on account of the defect; a thing which often happens. It is enough, therefore, to say that the point was not made, but the cause proceeded on entirely different questions, taking the escape for granted."

In *Beekman v. Bond*, (19 *id.* 444,) the head note of the case is: "Where, on the trial of a cause, a fact is assumed by the court and counsel to exist, and the case disposed of at the trial upon such assumption, the non-existence of the fact in the case presented to the court on a motion for a new trial, cannot be urged in opposition to the application for a new trial." The action was trover, for the value of a canal boat. The plaintiff claimed under a mortgage from Hartwell, the former owner. The defendant claimed under a purchase from Hartwell, alleging that the mortgage was fraudulent. The only evidence of the purchase was that "Hartwell sold the boat to the defendant." The court, in their opinion, say: "The point raised by the plaintiff's counsel that the defendant did not prove he *had paid value* for the boat, was not taken at the trial. On the motion for a nonsuit, it was *assumed* by the judge and by the counsel for both parties that the defendant was a bona fide purchaser,

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and that the only question was whether the plaintiff's mortgage was fraudulent. The party cannot now take an objection, which, if taken at the proper time, might have been answered."

In *Ford v. Monroe*, (20 *Wend.* 211,) the action was on the case, to recover damages for the negligence of the defendant's servant in driving a carriage. The court say: "The main ground urged in support of the application for a new trial is, that the proof failed to establish that the servant was acting in the business of the master, or within the scope of his authority. The answer to which is, that the point was not made upon the trial; neither in the motion for a nonsuit, or after the testimony had closed. The cause seems to have been tried and defended upon the *assumption* of the existence of the relation of master and servant between the defendant and the person driving the carriage. Had the objection been taken; more full proof might have been called out, so as to have placed the question beyond doubt."

In *Oakley v. Van Horne*, (21 *id.* 305,) the action, in a justice's court, was trespass for selling personal property for a school tax. "It did not appear that any evidence was given to show that before the levy the collector demanded the payment of the tax, according to 1 *R. S.* 478, § 48, 2d *ed.*" And the Delaware common pleas reversed the justice's judgment, given for the plaintiff. The supreme court reversed the judgment of the common pleas, and affirmed that of the justice; and they use this language: "Had the objection now raised come before us on a bill of exceptions, it must have been shown affirmatively that the collector failed to justify by proving a *demand* before he levied; and besides, that the defect was mentioned as an objection; for it is one which may be supplied, and we would intend that had the objection been raised it would have been obviated by proof of the fact. Here the parties were present, with every opportunity to raise the point. It has been held in a late case, on certiorari, that an

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omission to object will even authorize this court to infer a fact necessary to confer jurisdiction. (*Baldwin v. Calkins*, 10 *Wend.* 167, 174.)

In *Thurman v. Cameron*, (24 *Wend.* 87,) it was held that where, on the trial of an ejectment, a verdict is entered for the plaintiff, with leave to the defendant to move to set it aside, on the motion for a new trial the defendant is not allowed to object that the plaintiff *failed to show title in himself*, if such objection was not raised at the trial.

In *Hunter v. Trustees of Sandy Hill*, (6 *Hill*, 410,) which was an action of ejectment, one portion of the defense was that the land had been dedicated to the public use. In the argument at bar the plaintiff's counsel urged that the evidence of dedication was insufficient to sustain the verdict. But the court say: "It is now objected that the fact of dedication was for the jury, and that the judge erred in assuming it to be established. But this view was not presented at the trial, and the point cannot now be raised."

In *Willard v. Bridge*, (4 *Barb.* 361,) the action was trover against a warehouseman, for two bales of hops, and the court, among other things, charged the jury that the delivery of the hops by the warehouseman to any other than the true owner was a conversion. In the argument at bar the counsel attempted to raise the question that there was no sufficient evidence of such *delivery*; but the court refused to entertain the question; holding that "the cause was tried and submitted to the jury upon the *assumption* that the property had been taken by some person other than the owner from the warehouse of the defendant."

In *The Trustees of St. Mary's Church v. Cagger*, (6 *Barb.* 576,) which was error from the mayor's court of Albany, the defendant moved for a nonsuit upon the grounds, 1. That the plaintiff had shown no right to recover; and 2. That the evidence did not entitle the plaintiff to recover under the declaration; which motion was denied. In the supreme court

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the counsel for the plaintiffs in error, upon the above mentioned grounds, attempted to raise the question that Susannah Cagger (the plaintiff below) was not shown to be the legal representative of William Cagger, (to whom the defendants were indebted.) The court held that this point was not sufficiently presented in the court below, and affirmed the judgment.

In *Merritt v. Seaman*, (6 Barb. 335,) the general rule in regard to the necessity of making objections pointed and specific, is well stated by Parker, J. in the following language : “ It is a salutary rule, and applicable as well to cases as bills of exceptions, that a party shall not be permitted, on a motion for a new trial, to avail himself of an objection made at the trial, unless the ground of objection was so particularly stated as to enable the opposite party to supply, if possible, the alleged defect. (*Van Gorden v. Jackson*, 5 John. 467. *Frier v. Jackson*, 8 id. 507. *Jackson v. Caldwell*, 1 Cowen, 622. *Hunter v. Trustees of Sandy Hill*, 6 Hill, 407. *Willard v. Warren*, 17 Wend. 257. *Thurman v. Cameron*, 24 id. 87. *Ryerss v. Wheeler*, 25 id. 437. *People v. Bodine*, 1 Denio, 281. *Williams v. Larkin*, 3 id. 114. *Gillett v. Campbell*, 1 id. 520. *Underhill v. Pomeroy*, 2 Hill, 603.)”

In *Munson v. Hegeman*, (10 Barb. 112,) which was trover to recover the value of two canal boats, the plaintiffs' counsel having stated that it was admitted by the pleadings that the defendants sold said canal boats, and that the plaintiffs had demanded them and the defendants had refused to deliver them, and this statement not having been denied by the defendants' counsel, and the judge having thereupon, without proof, disposed of the cause upon the *assumption* that the facts were *as stated*, it was held on appeal that these facts were not open to debate, or to the objection that they were not proved, but must be taken as admitted. The court say, it is objected “ that the alleged demand and refusal was not admitted by the pleadings. This objection comes too late.

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The admission was assumed by the court as true, without objection or dissent on the part of the defendants' counsel."

The judgment of the county court should be *reversed*, and that of the justice *affirmed*.

[ALBANY GENERAL TERM, March 8, 1862. *Gould, Hogeboom and Peckham*, Justices.]

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BALL vs. PRATT.

A sheriff acts *officially* in selling the property of a stranger to the execution as the property of the defendant therein.

He may take an indemnity from the plaintiff, for such an act, when done in good faith, but cannot give an indemnity to the bidders at the sale.

Where an under sheriff agreed with the bidders at a sheriff's sale to warrant the title to the property sold, *held* that such an agreement rested upon no consideration of benefit to the sheriff, except as it necessarily tended to increase the fees and perquisites of his office; and that in that respect it was void, as against public policy.

A sheriff, while in the discharge of his official duty, cannot divest himself of his official character, and do as an individual what he cannot do as a public officer.

THE complaint alleged, in substance, that the defendant, being under sheriff of the county of Jefferson, and having an execution against the property of Charles K. Loomis, Jacob Brown Kirby and Joseph E. Baker, in favor of Henry J. Tarbell, William S. Jennings and Andrew Millspaugh, levied the same upon certain sawed lumber as the property of Kirby & Loomis, and upon the sale thereof under the execution the plaintiff desired to bid on the property, and offered to bid on the same in case he could be assured of the title thereto; and that thereupon the said defendant, in consideration that the plaintiff would so purchase and pay the purchase money therefor, undertook, promised and agreed with the plaintiff, that the title of said Loomis & Kirby to

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said lumber was perfect; and he would indemnify and save the plaintiff harmless against all persons claiming and to claim the same. That the plaintiff, relying upon such promise, purchased 15,456 feet of said lumber, of the value of \$100, for the sum of \$53, he being the highest bidder; and thereupon paid the defendant the purchase money.

It was further alleged in the complaint that the lumber was not the property of said Kirby & Loomis, but was the property of Merrit Coburn and William M. Coburn, who, as such owners, took of the lumber so sold to the plaintiff about 4595 feet, of the value of \$27. And the plaintiff having taken the balance, the Coburns sued him before a justice, and recovered of him the sum of \$72.22 damages for the value of the lumber so taken away by the plaintiff, and the sum of \$5 for the costs of the action. That on the trial the defendant was notified and requested to defend the action, and the action was defended at the request and for the benefit of the defendant. That an appeal was taken to the county court, and the judgment affirmed, the defendant having indemnified the plaintiff for the costs of the appeal. The plaintiff having paid the judgment, brought this suit to recover his damages.

The defendant denied the complaint, except the allegations in respect to his having sold the property as under sheriff upon the execution in question. The action was tried at the Watertown circuit, in November, 1860, before Justice ALLEN and a jury.

On the trial, evidence was given that the plaintiff bid off the lumber, and that the title failed, in consequence of which he was sued and was compelled to pay a large sum for damages and costs. The defendant offered to pay him \$53.12, but refused to pay him any more.

The plaintiff swore, on the trial, that "Pratt said he had a good bond of indemnity, and he would indemnify me; he got a bond of indemnity from the plaintiffs for the costs of the appeal, but did not give it to me, and I don't know what

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he did with it; he told me Dorwin was his attorney; don't know if he said Dorwin was employed by plaintiffs; Pratt said, go to Dorwin and whatever he said do, do it, and I shouldn't lose a shilling any way; I have no memorandum of the warranty, it is only from recollection." Abner Reeves testified that he was present at the sale of lumber; heard some questions made as to the title; "Pratt said he was indemnified by New Yorkers, and would indemnify all who bought lumber, and would see them all harmless, and nobody that would buy, should lose a shilling; before that, no one would buy any of it; upon that they purchased, and I bought some." On his cross-examination the witness further testified: "There was no written memorandum of warranty; defendant said he would indemnify any one who bought; I bought lumber." A. L. Cooley testified that he was present at the sale, when Ball bought; he was backward about bidding; "defendant said he would see to it that those who bought should have a good title; said he was not going to be bluffed off; he was going to sell the lumber." John Hammond testified as follows: "Was present at the sale; sale was forbid; the title was questioned; Pratt said he had a written indemnity in his pocket, from the New Yorkers; if any one bought, he would indemnify him and see he did not lose a shilling." On his cross-examination the witness further testified: "Cooley forbade sale, in behalf of Coburn and Bagley; Pratt said he would see they had a good title; said he had got a written indemnity in his pocket, and would indemnify all who bid, and save them harmless; they would not get into a scrape; was going to run for sheriff, and if he got them in a scrape they would not vote for him."

The plaintiff rested his case, and the defendant's counsel moved for a nonsuit, and, in support of his motion, submitted the following points: 1. The plaintiff sues an under sheriff, on a contract made by him as under sheriff, when the action should be against his principal. The contract proved varies from the contract alleged in the complaint. 3. The



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contract, if proved, is wholly without consideration, and is void. 4. The contract, if made, is one made by a public officer, is against public policy, and cannot be maintained.

The court denied the defendant's motion for a nonsuit, and directed the jury to find a verdict for the plaintiff for \$136.33, and the defendant excepted.

The plaintiff having perfected judgment upon the verdict, the defendant appealed to the general term of this court.

*J. F. Starbuck*, for the appellant.

*J. Clark*, for the respondent.

*By the Court*, MORGAN, J. If we consider the under sheriff as the mere agent of the plaintiff in selling the property, there is no difficulty in holding that he would be liable to the purchaser upon an express warranty of title. (*Story on Agency*, §§ 262, 269.) The question is not without difficulty when we regard him as a public officer. The taking of this property on the execution against Kirby & Loomis was a trespass. And it was held in the case of *The People ex rel. Kellogg v. Schuyler*, (4 Comst. 173,) that the seizure of the goods of another than the defendant in the execution was an act of official misconduct on the part of the sheriff and his deputy, for which he and his sureties would be liable upon his official bond. And it was supposed by the chancellor, in delivering the opinion of the court in *Burrall v. Acker*, (23 Wend. 607, 608,) that an agreement which necessarily implied any breach of duty on the part of the sheriff, was against public policy and void. And Bronson, J. in *Browning v. Hanford*, (5 Hill, 598,) expressed the opinion that the sheriff cannot take a receipt, or any other contract in relation to the property, which will give him a remedy beyond his own liability to the creditor. He remarked: "But he cannot go beyond that and take an agreement for any thing more than an indemnity. That would be using his office and

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the process of the court, for the purpose of making a profit or advantage to himself beyond his legal fees." Regarding the sale of the property in this case as a breach of duty, as it was held in *The People v. Schuyler*, could the sheriff or his deputy enter into an agreement with third persons to assist him in the violation of his duty? Had the sheriff a right to make an engagement beyond his duty as an officer, to warrant the title? The result would be that he might thereby increase his fees, and under color of his office deprive a third person of his property. Perhaps it might be regarded as oppressive towards third persons to allow the sheriff to take their goods under color of an execution, and enter into contracts with bidders to purchase them under a promise of indemnity. Those who purchase at a sheriff's sale have no claim to be indemnified, and they really purchase no greater interest than the sheriff can rightfully sell. It is therefore worthy of consideration whether they have any right to contract with the sheriff for a greater interest. If it be said that the sheriff, in warranting the title, warrants it as an individual and not as sheriff, it might with the same apparent propriety be said that, when he sells another's property instead of that of the defendant in the execution, he sells it as an individual and not as sheriff. For the action against him by the owner is not brought against him as sheriff, but is prosecuted against him in his individual character. And yet it seems that such a sale is *by virtue of his office*, and renders the sheriff guilty of *official misconduct*. (4 Comst. 173, *before cited*.)

Now while it is held that any bond of indemnity taken by the sheriff to indemnify him against an action for neglect of duty on his part, is void, (*Crocker on Sheriffs*, § 764; and see 1 Comst. 365;) and while it is held that the sheriff commits a *breach of duty* by seizing the goods of a stranger to the execution, (2 Comst. 173,) yet it is held that the sheriff may take a bond of indemnity from the plaintiff in the execution for seizing and selling a stranger's property, and recover

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upon it, if he is afterwards mulcted in damages. (*Crocker*, § 763. *Gardner, J. in The People v. Schuyler*, 2 *Comstock*, 183.)

And the statutes of this state contain provisions recognizing the right of the sheriff to protect himself by a bond of indemnity for seizing property which his process does not authorize him to take. (2 *R. S.* 4, §§ 10, 11.) The same right is recognized in numerous cases, and it is too late to call it in question. *Gardner, J.* in delivering the opinion of the court in *The People v. Schuyler*, (4 *Comst.* 183,) remarked: "The action of trespass against sheriffs for the seizure of property in the execution of legal process, is *sui generis*. It is regarded in the law, in many instances, as a means of determining the title to property, rather than in the light of an ordinary trespass. Good faith on the part of the officer is presumed, and he may consequently require and receive indemnity."

It follows, I think, that although the sheriff is guilty of a breach of official duty in selling the property of a stranger to the execution, and can claim no protection under his execution when sued in trespass for the wrong, yet he may take a bond from the plaintiff, in such a case, to indemnify him for an act which is held in some cases to be a breach of duty. Such a bond is not within the prohibition of the statute, nor against public policy, because the sheriff is supposed to act in good faith, and the suit is regarded as a proper one to try the title to the property. It is not a trespass wholly unauthorized by law, although it subjects the sheriff to all the consequences of a naked trespass, so far as the owner of the goods is concerned. Without stopping to reconcile the cases, it is enough to say that the sheriff, if he acts in good faith, can lawfully take an agreement from the plaintiff to protect him for seizing the goods of a stranger to the execution. But he cannot go beyond that and take an agreement for any thing more than an indemnity. (*Bronson, J. in Browning v. Hanford*, 5 *Hill*, 598.)

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The case in hand shows that the sheriff took such an indemnity, and he declared to the bidders that he had it in his pocket, and when the bidders refused to bid on the property for the reason that they distrusted the title, he volunteered to warrant a good title, on his own personal responsibility.

It will be observed that he had no authority from the plaintiff to give such a warranty. Nor could he take from the plaintiff an indemnity to protect the purchaser, without violating the rule already established; which is, that the sheriff can only take an indemnity for his own protection.

It was not necessary for his protection that he should protect the bidders at the sale. The law simply allows the officer to protect himself, as it is supposed he acts in good faith when he seizes a stranger's property, and is therefore entitled to be indemnified by the plaintiff, for whose benefit he takes the responsibility. He is allowed to do this *as an officer* in the discharge of what he believes to be an *official duty*, although if he is mistaken it is, at least *constructively*, an act of *official misconduct* which would make his sureties liable upon his official bond.

In this position, having, as the case shows, been guilty of an act of trespass in seizing and selling property not belonging to the defendant in the execution, and the same act being a breach of official duty, the sheriff goes a step further and undertakes to make a contract with the bidders, that if they will buy the property he will guaranty a good title. Relying upon the personal guaranty of the sheriff, the plaintiff in this action bids off the lumber and pays the sheriff the amount of the bid.

It is already seen that the sheriff cannot use the plaintiff's indemnity to protect such a guaranty, for that is not an official act, in any sense, and is not necessary for the sheriff's protection. But it is apparent that the sheriff may be benefited by such a bargain. Its object is to induce bidders to raise their bids; and *its effect is to increase the fees of the sheriff*. Such an agreement with bidders at the sale, is

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therefore simply an arrangement by which the sheriff, *for no other benefit to himself than an increase of his legal fees*, undertakes to guaranty the title to the property sold.

It is very likely that the deputy in this case supposed that he could safely warrant the title; and that the plaintiff's bond of indemnity would enable him to protect himself if he was subjected to damages in consequence of his warranty. It is also probable that the plaintiff here, who bid off the property upon the faith of the warranty, supposed that the deputy had an indemnity, which would enable him to reimburse himself if he was subjected to damages for a breach of the warranty. But all these parties must be charged with knowledge of the law. And if I understand the law, the sheriff could not give an indemnity which could only benefit him by an increase of his fees; and which both he and the bidders must have known he had no right to give as a public officer. It is not for the sake of the sheriff as an individual that the law relieves him from such a contract; but the contract is one which purchasers at a sheriff's sale have no right to take from the officer, whose duties are prescribed by law; and who cannot with safety to the public be allowed to contract for any benefit to himself, beyond what a faithful discharge of his official duties entitles him to. The sheriff, while in the discharge of his official duties, cannot divest himself of his official character, and do as an individual what he cannot do as a public officer.

It is doubtless true that he may become the agent of the plaintiff, to a certain extent, and take responsibilities which go beyond his strict official duty, when he acts in good faith and in the supposed discharge of his duty as an officer; and that the plaintiff may protect him in doing so. But he cannot increase his fees by entering into a personal engagement on his individual account, which he is not allowed to do as a public officer. The policy of the law will not allow him to do more than his official duty with a view to increase his fees and emoluments. It cannot change the principle, because it

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happens that he has made a bad bargain. He did not, in this case, expect to lose by it; and the law is violated just as effectually whether he makes or loses by it.

But it is obvious that the same considerations do not apply to other parties; and there does not appear to be any objection to a warranty of title on the part of the plaintiff in the execution. The rule is intended to keep public officers within the line of their duties, and not allow them to take advantage of their official position to make money by entering into engagements which tempt them to abuse the process of the courts, and oppress those who are to be affected by their official proceedings. In my opinion, the contract of the under sheriff with the plaintiff, in this case, to warrant the title of the property, necessarily resulted in increasing the fees of the sheriff. It was a contract to benefit the sheriff for doing something beyond his official duty, and therefore void as against public policy.

The judgment should be reversed, and a new trial granted; costs to abide the event.

Judgment accordingly.

[ONONDAGA GENERAL TERM, April 1, 1862. *Mullin, Morgan and Bacon*, Justices.]

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CRAIN vs. CAVANA and others.

The late court of chancery had no authority, in a divorce suit, to require a married woman to accept a gross sum from her husband in lieu of and in satisfaction of her dower.

Her acceptance of such sum in the lifetime of her husband will not defeat her dower.

And her release of dower *to her husband*, pursuant to an order of the court, although acknowledged in due form, would be a nullity; she being, *it seems*, legally incompetent to execute such an instrument to her husband, except in the single case authorized by the laws of 1840, p. 128, viz. upon a sale of real estate under a judgment or decree in partition.

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A pecuniary provision to bar dower, under 1 R. S. 741, § 12, must be a provision to take effect in possession or profit immediately on the death of her husband.

**T**HIS action was commenced in March, 1860, for the partition of real estate in Oneida county.

The question arises out of the claim of dower of the widow, *Cynthia Cavana*, in the lands of which her husband, *Thomas Cavana*, died seised, and of which partition is sought in this action. Her claim was allowed, and the other defendants brought an appeal to this court. In 1843 the late court of chancery granted a decree to *Cynthia Cavana* separating her from her husband, *Thomas Cavana*, on account of his cruel and inhuman treatment, with liberty to the parties to apply to the court to be discharged from the decree. And it was further decreed that the husband should pay to his wife, "as alimony, the sum of four hundred and fifty dollars, as follows: Fifty dollars in thirty days, and the residue in four equal annual installments with annual interest from the 27th day of June, 1843, to be paid yearly and every year until the same is fully paid and satisfied, to be applied towards the maintenance and support of the said complainant and her infant daughter, *in lieu and satisfaction of all alimony, dower, right of dower, and all other claims which she may or can have to the property of the defendant.*"

It was admitted that the husband paid his wife the \$450, under and in pursuance of the decree, and that they never came together again. The husband died in 1859, seised of the lands in question, and leaving the said *Cynthia*, his widow, and three children him surviving, all of whom were made parties to this suit.

*Kernan, Quin & Kernan*, for the appellants.

*W. O. Merrill*, for the respondent Clara M. Crain.

*Dennison & Lynch*, for the respondent *Cynthia Cavana*.

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*By the Court*, MORGAN, J. It will be observed that the decree contains no direction that the wife shall do any act, or enter into any conveyance, which would be sufficient in law to release her dower. Nor has she executed any release. A release drawn up in form to carry into effect the decree, would run to the husband. And I think if she could not for the same consideration voluntarily release her right of dower to her husband, the decree cannot operate to work out such a result. It is an admitted rule of the common law that a wife cannot relinquish her dower in the real estate to her husband by executing a release thereof to him, or in any other way than by joining with him in a conveyance to a third person. Hence it was held in *Carson v. Murray*, (3 Paige, 483,) that although a valid agreement might be made between husband and wife, through the medium of a trustee, for a separation and for a separate allowance to the wife for her support, yet when such agreement declared that such provision should be in full recompense for and a bar of her dower in his real estate, she was entitled to the provision secured to her in the article of separation, and also to dower. (*See also* 14 Barb. 531.) The law, in its anxiety for the preservation of this favorite provision, puts it absolutely out of the power of the husband to deprive his wife of it, without her concurrence solemnly manifested by matter of record. (*Park on Dower*, 191.)

At a very early day it was said the wife's claim to dower might be barred by her assent, because *feoffments* were then made publicly in court. (*Id. note (a).*) And where a *fine* was levied by husband and wife which operated to bar her of her dower, it imported a grant of the fee. And to conclude her she was brought into court and her assent obtained, after a personal examination by the judge. (*Id.* 200, 203.) In this state we have no such modes of conveyance, and to deprive the wife of her dower right, she must acknowledge the conveyance in the form pointed out by the statute. (2 R. S. 758, § 10. 13 Barb. 50.) And there is only one



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case where she can release her dower right to her husband, and that is confined to sales of real estate under a judgment or decree in partition. (*Laws of 1840, p. 128.*)

The court of chancery, therefore, had no authority to require a married woman, although a party, to accept a gross sum from her husband in lieu of and in satisfaction of her right of dower. And her release of dower to her husband, although voluntary, and duly acknowledged and made in pursuance of such decree, would be a nullity; as she is legally incompetent to execute such an instrument to her husband, except in the single case authorized by the act of 1840.

The counsel for the appellant, without attempting to overcome these difficulties, suggests that the widow is deprived of her dower by virtue of the provision of the revised statutes, which enacts that “if before her coverture but without her consent, *or if after her coverture*, lands shall be given or assured for the jointure of a wife, *or a pecuniary provision be made for her in lieu of dower*, she shall make her election whether she will take such jointure or *pecuniary provision*, or whether she will be endowed of the lands of her husband, but she shall not be entitled to both.” (1 *R. S.* 741, § 12.)

It is sufficient to say, in answer to this suggestion, that she has one year after the death of her husband to make this election. (*Id.* § 14.) This would show, without reference to the authorities, that the pecuniary provision which was thus provided must be something that she can take and enjoy, after the death of her husband. And it was left undecided in *McCartee v. Teller*, (8 *Wend.* 267, 276, 277; *S. C.*, 2 *Paige*, 511,) whether this provision should not continue during life, in order to bring it within the intention of the statute. It was however decided that this equitable provision, to bar dower, must be a provision to take effect in possession or profit immediately on the death of the husband. And it is clear that if the pecuniary provision does not come within the requirements of the statute, the widow would be entitled to dower although she had accepted of the provision. She

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certainly cannot be estopped by an election before she is capable of making it; and where, as in this case, she has consumed the pecuniary provision in the lifetime of her husband, there is nothing left upon which to base an election.

I find that in the case of *Forrest v. Forrest*, (6 *Duer*, 102,) the decree, after directing the payment to the plaintiff of \$3000, by way of annual allowance, and making provision for security, also directed the plaintiff, upon being tendered the requisite security, to "execute and deliver to the said defendant a release of any claim of dower in his real estate, in such form as any justice of the court should settle and approve." And it was then held, upon appeal by the plaintiff, that the court erred in forcing upon the plaintiff this condition. And it having been established in *Wait v. Wait*, (4 *Comst.* 95,) that the alimony contemplated by the statute, in divorce cases, is not to be taken in lieu of dower, the court, in *Forrest v. Forrest*, (p. 108,) very properly came to the conclusion that it had no power to make her release of her right of dower a condition of granting the divorce, or to enforce such a release upon her, peremptorily.

But if I am right in my conclusion, such a release to her husband, even if executed by the wife voluntarily, would be a nullity at common law, and wholly unauthorized by statute.

I think the judgment should be affirmed, with costs to be paid by the appellants.

Judgment affirmed.

[ONONDAGA GENERAL TERM, April 1, 1862. *Mullin, Morgan and Bacon*, Justices.]

FRANK *vs.* HARRINGTON.

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Hops, growing and maturing on the vines, which are produced by the annual cultivation of the owner, are personal chattels within the meaning of the statute of frauds; and as such are subject to sale like other personal property.

THIS action was tried before CAMPBELL, J. at the Madison circuit, in September, 1861. The case shows that on the 17th day of August, 1860, the plaintiff entered into a parol contract with the defendant for the purchase of his crop of hops, of about seven thousand pounds, then growing and maturing on the defendant's farm, for the price of thirteen cents per pound. The plaintiff paid down one dollar, and was to pay the balance when the hops were delivered at the defendant's kiln on the premises, and accepted by the plaintiff.

The defendant refused to deliver the hops in pursuance of the sale, and the plaintiff thereupon sued him for the damages. On the opening of the case by the plaintiff's attorney, the defendant moved the court to nonsuit the plaintiff upon the ground that the contract for the sale and delivery of hops then growing and maturing was void, said hops being real estate. Whereupon the court nonsuited the plaintiff; to which ruling and decision the plaintiff's counsel excepted. The exceptions were ordered to be heard in the first instance at a general term.

*B. F. Chapman and H. A. Foster, for the plaintiff.*

*Schoolcraft & Snow, for the defendant.*

*By the Court, MORGAN, J.* The question is whether hops, growing and maturing on the vines, are real or personal property.

When the argument was opened, I supposed that perhaps the decision of this question was involved in the judgment of the court of appeals in *Bishop v. Bishop*, (11 N. Y. Rep.

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123.) But the counsel on both sides treat that case as one which depends upon other considerations, and not necessarily involved in the decision of this. The question there was whether hop poles were real or personal property ; and they were declared to be real estate, because they were "habitually attached to the land," although "not constantly fastened to it." Gardiner, Ch. J., who delivered the opinion of the majority of the court, observed, however, that "the root of the hop is perennial, continuing for a series of years. That this root would pass to the purchaser of the real estate, there can be no question."

It is conceded, in the very learned argument of the plaintiff's counsel in this case, that the root of the hop is real estate ; but he contends that the crop itself, like grain, is personal property. And to this point he cites *Latham v. Atwood*, (*Croke Charles*, 515.) The report of that case states that the question was, "whether these hops appertained to the baron or to him in remainder." And the court held that "they be like emblements which shall go to the baron or executor of the tenant for life, and not to him in remainder ; and are not to be compared to apples or roots which grow of themselves ; wherefore adjudged for the plaintiff."

The same resolution was come to in an anonymous case reported in 2 *Freeman's Reports of Cases in Law and Equity*, 210 ; and afterwards in *Fisher and Forbes*, referred to in 9 *Viner*, 373, pl. 82. And according to 9 *Viner*, 372, pl. 77, "hops growing out of old roots shall go to the executor or administrator, because they grow by the manurance and industry of the owner, and so are emblements."

The same law is declared in 3 *Bacon's Ab. tit. Ex'rs and Adm'rs*, (*H*), p. 493. And such is the statement of several other authors who undertake to give the rule as it was understood to exist in England prior to our revolution. Most of these authors refer to the case of *Latham v. Atwood* as authority. The reason of the rule, as stated in the report of that case, is that "they (hops) be such things as grow by

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manurance and industry of the owner, by the making of hills and setting poles." The plaintiff's counsel have also referred to some late English decisions which, without deciding the question, recognize the law as laid down by the court in *Latham v. Atwood*. (See *Evans v. Roberts*, 5 B. & C. 829, and *Graves v. Weld*, 5 B. & Ad. 105.)

*manures  
industries*

The reason given by the court in *Latham v. Atwood* for holding hops to be personal instead of real estate, is very satisfactory. It is well known that the value of the crop depends in a very great measure—almost entirely—upon the "manurance and industry of the owner;" and like other annual crops, which depended upon yearly cultivation, should go to enhance the personal estate.

The defendant's counsel have submitted a very ingenious argument, the principal point of which is to show that hops are *natural* products of the earth; and as such, real estate, like growing trees, grass and fruit. As an original question his argument would be very satisfactory to prove that strawberries and grapes, as now cultivated, grow by the same "manurance and industry of the owner," as hops, and should be put in the same category; although the result would be that they too ought to be treated as personal instead of real estate.

The decisions are not uniform as to the rule which should distinguish between real and personal property, within the meaning of the statute of frauds. In some cases it is held that grass is personal property, if sold in prospect of separation from the freehold. (*Roberts on Frauds*, 126.) But the majority of the cases hold that if the subject grows spontaneously, *without cultivation, or annual cultivation*, it is a part of the realty. (6 *East*, 602. 1 *Barb.* 542. 1 *Denio*, 550. 6 *Gill & J.* 188.) Such undoubtedly were the views of the revisers when they recommended the legislature to enact the provisions contained in the revised statutes, declaring the following, among other things, to be assets, viz: "Crops growing on the land of the deceased at the time of his death,"

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and "any kind of produce raised *annually by labor and cultivation*, except grass growing or fruit not gathered." (2 R. S. 83, §§ 5, 6.) They state that their object was "to enumerate those articles which are likely to occasion doubt, to settle some disputed cases, and yet to include every thing which ought to be included, by the use of general terms, to protect the heir." (3 R. S. 2d ed. p. 639.) It will readily be seen that the rule must be more or less arbitrary in relation to fruit, as much if it is grown by great annual labor, while some of it requires but little cultivation. The rule can hardly be made to change, so to meet the varying changes which occur in the cultivation of these natural productions. As the value of the hop depends so essentially upon manurance and annual cultivation, there is no reason why it should be taken out of the category of "produce raised annually by labor and cultivation," by any new interpretation of the statute of frauds. It would be more just to the rights of parties to take certain varieties of fruits from the statute definition and call them assets; as their value and quantity depend almost altogether upon manurance and annual cultivation; especially the grape and strawberry. It requires but little soil to raise them, and in other respects they are produced by personal labor and at the expense of the personal rather than of the real estate of the owner. And to produce uniformity and prevent confusion, these various productions of the soil should, if consistent with the decisions of the courts in other cases, be treated as real or personal property, whether the question arises between the heir and executor, or between the debtor and creditor, or within the definition of the statute of frauds. The statute being silent as to hops, we must decide this question upon authority independent of the statute. I have already referred to the English decisions, which put them in the category of personal property, and the reasons which influenced the court in coming to that conclusion. And I have expressed my satisfaction with the reasons as given in the original case of *Latham v. Atwood*, (*Croke*

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Charles, 515.) The defendant's counsel has, by great research, found several cases which he thinks overrule the decision of the court in *Latham v. Atwood*. The first case cited by him is *Woddington v. Bristow*, (2 Bos. & P. 452.) But the hops which were the subject of the contract in that case were not yet growing upon the vines. They were not *in esse* at the time the contract was made, and therefore not the subject of sale. And such is the statement of the case by the judges. The case of *Latham v. Atwood* was not even alluded to. The case of *Emmerson v. Heelis*, (2 Taunton, 38,) is more to the point. That was a sale of turnips in the ground, and the court held that it was a sale of an interest in land and must be in writing. Mansfield, Ch. J. said he could not distinguish it from the case of hops. But the case does not profess to overrule *Latham v. Atwood*, and the decision is wholly irreconcilable with subsequent English cases and the decisions of our own courts, without exception, so far as they have come under my observation. The decision of the court in *Parker v. Standard*, (11 East, 362,) Crosby v. Wadsworth, (6 id. 602,) S. C., (2 Smith, 559,) approve of the case of *Woddington v. Bristow*, (2 Bos. & Pul. 452,) but upon grounds which, at the present day, are not regarded as authority. (See *Green v. Armstrong*, 1 Denio, 550, 555, 6; *Mumford v. Whitney*, 15 Wend. 380, 386, 7.) The case of *Woddington v. Bristow* was again under review in the English courts in *Jones v. Flint*, (10 Ad. & El. 753, 759,) and it was said by the judge (Lord Denman, Ch. J.) who delivered the opinion of the court, that it was "very difficult to reconcile all the cases, and still more so all the *dicta* on the subject, from the case of *Woddington v. Bristow* to the present time, and we are therefore left at liberty to abide by a general principle." The judge observed: "We agree that the safer grounds of decision are the legal character of the principal subject matter of sale, and the consideration whether in order to effectuate the intentions of the parties, it be necessary to give the vendee an interest in the land." And he re-

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fers with approval to the case of *Evans v. Roberts*, (5 B. & C. 829, 837, 840,) where Littledale, J. says : " I think a sale of any growing produce of the earth (reared by labor and expense) in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land, within the meaning of the 4th section of the statute of frauds." It was held in *Jones v. Flint* that corn and potatoes were goods and chattels within the meaning of the statute of frauds, and for the reason that they are *fructus industrialles*, while grass is not. (*Id.* p. 758.) This is the same reason given in *Latham v. Atwood* for holding that hops growing and maturing on the vines are chattels personal and not chattels real.

In my opinion, therefore, hops, growing and maturing on the vines, which are produced by *annual cultivation* and the industry of the owner, are personal chattels within the meaning of the statute of frauds, and as such subject to sale like other personal property.

A new trial should be granted ; costs to abide the event.

New trial granted.

[ONONDAGA GENERAL TERM, April 1, 1862. *Mullin, Morgan and Bacon*, Justices.]

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**BUFFIT vs. THE TROY AND BOSTON RAIL ROAD COMPANY.**

It is not unlawful, nor against public policy, for a rail road company to convey passengers by stage to and from one of its stations and an adjacent village, in connection with and as a part of its business of transporting passengers upon its road ; nor is a contract made by it, thus to carry a passenger, *ultra vires*.

Such a contract is lawful, and the rail road corporation is estopped from denying its validity.

Where a rail road company employs an individual to convey passengers to and fro between a village and a station on the rail road, in stage sleighs



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furnished, together with the horses and drivers, by him, such company is liable in damages for any injury sustained by a passenger in consequence of the overturning of a stage-sleigh through the negligence of the owner or his servant.

**A**PPEAL from a judgment at the circuit. The action was brought to recover damages for injuries sustained by the plaintiff, by the overturning of a stage-sleigh employed by the defendant for the purpose of conveying passengers to and fro between the village of Schaghticoke Point and the Schaghticoke station on the defendant's rail road, distant about a mile from said village, and was brought to trial before Justice HOGEBOM and a jury, at the Rensselaer circuit, on the fourth Monday of May, 1860. The following is a brief statement of the material facts in the case:

The defendant is an incorporated company, authorized to construct and operate a rail road from the city of Troy to the state line of Vermont, at or near Pownal. Such rail road passes about a mile from the village of Schaghticoke Point, at what is called Schaghticoke station. Passengers on the defendant's rail road, going to or from the village of Schaghticoke Point, had, ever since the opening of the road, been conveyed in omnibuses, stage-wagons or sleighs, which, in going to the trains, ordinarily started from the upper end of the village and passed down through the main street, stopping along for passengers. The conveyances used for this purpose were furnished by John Downs, who was, together with his conveyances, horses and servants, hired by the defendant, at a daily compensation, to carry passengers between the village and the station; and said Downs was in the defendant's employ for that purpose at the time of the occurrence out of which this action arose. On the day of the occurrence, (March 11, 1857,) the plaintiff took passage, at the lower end of the village of Schaghticoke Point, on the stage-sleigh, then driven by one of Downs' men, for the purpose of coming to Troy by the defendant's rail road. As the sleigh stopped, the driver told the plaintiff that it was full

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inside, and he (plaintiff) got on the outside. The defendant had no ticket office at the village of Schaghticoke Point, but Downs sold tickets. Passengers generally purchased their tickets of Downs after reaching the depot, but sometimes at the village. The plaintiff had not purchased one on that occasion. Between the village and the depot the sleigh was overturned, and the plaintiff received the injuries for which this action was brought. No question is now made that the driver was guilty of negligence which was the immediate cause of the overturning of the sleigh, nor that the plaintiff thereby sustained severe injuries, and accordingly all of the evidence on these points is omitted in the case.

When the plaintiff had rested, the defendant moved for a nonsuit, on the following grounds: 1. No proof of a contract to carry the plaintiff as a passenger. 2. No money having been paid by the plaintiff, nor information given by him that he designed to be a passenger, he did not become such, and the defendant was not bound to him by contract or duty, and is not liable for the injuries in question. 3. The defendant is a common carrier only by rail road; and had not power under its charter to contract to carry the plaintiff from Schaghticoke Point by stage to Schaghticoke station, and such contract, if made, was illegal and void. 4. The defendant is not estopped from denying the obligation of a contract which it had no power to make.

The nonsuit was refused, and the defendant excepted. The motion was renewed at the close of the evidence, on the same grounds, again denied, and the defendant again excepted. The court, among other things, charged the jury, 1. That the defendant had a right to employ Downs and his vehicles to transport passengers from Schaghticoke Point to the station, and from the station to the point, and that this was legitimately connected with the business of rail road transportation. The defendant excepted. 2. That the defendant might lawfully contract to carry rail road passengers from Schaghticoke village to the station, and might lawfully

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employ stages for that purpose. The defendant excepted. 3. That it was a question of fact for the jury whether the plaintiff became a passenger with the defendant, and the burthen of proof was with the plaintiff. The jury rendered a verdict for \$450 damages, on which judgment was perfected on the 22d of June, 1860, and the defendant appealed to this court.

*W. A. Beach*, for the plaintiff, (respondent.)

*D. L. Seymour*, for the defendant, (appellant.)

HOGEBROOM, J. Two questions are made in this case :

1. Was the plaintiff a passenger with the defendant.
2. Was the contract for carrying by stage a lawful one.

I. As to the first question, the proof was sufficient to go to the jury, and it was submitted to them with instructions that the plaintiff held the affirmative.

1. The stage was run in connection with the rail road, and so far as appears, for no other purpose.

2. It was not customary to pay the fare until reaching the depot. The omission to tender it was not therefore any evidence that the plaintiff was not a passenger.

3. The *presumption* is, that the plaintiff entered the stage intending to take passage by *rail*.

4. The proof (received without objection) is express that such was his intent.

5. These facts made a legitimate case for the jury, and the question being fairly submitted to them, their verdict on this point should not be disturbed.

II. Was the business of the defendant, in running the stage in connection with its rail road, *unlawful*, and the contract to convey the plaintiff by stage *ultra vires* ?

1. It must be conceded that the right to run a stage was not one of the *express* powers granted by the charter ; nor

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perhaps an *implied* power *indispensably* necessary to carry into effect the express powers.

2. But it was nevertheless a power *convenient and proper* for the successful transaction of the business of the defendant, promotive of the objects of the corporation, and conducive—at least not injurious—to the interests of the public.

3. It appears to have been exercised in strict subordination to the principal objects of the incorporation, to wit, the transportation of passengers and freight by rail, with safety, convenience and dispatch. It was not made an *independent* business, carried on for purposes of speculation, nor with a view to compete with rival conveyances from the village, by stage, but strictly *incidental* to rail road operations, and confined to the immediate neighborhood of the depot.

4. In itself the business was not an unlawful nor a prohibited one; nor was it, to the limited extent it was carried on, against public policy.

5. Under these circumstances, can it be said to be unlawful, or beyond the just powers of the corporation, fairly and reasonably construed?

6. If so, then *any* conveyance of passengers by stage between the termini of different rail roads in a city, or between disconnected portions of the same rail road, disconnected by accident or design, permanently or temporarily, is illegal if carried on by the rail road company. And any conveyance of passengers by the rail road, if it happens to traverse in any portion of its route, land not expressly dedicated to the rail road company, or the title to which has not been legally acquired, is also illegal.

7. I am inclined to think that as the business, irrespective of the charter, was lawful in itself, plainly promotive of the objects of the incorporation, not pushed beyond a needed accommodation to the immediate neighborhood, and not violative of any principle of public policy, the business was lawful.

8. It seems also to be settled by judicial decision, at least

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so far as this court is concerned, that such a contract is lawful, and that the defendant is estopped to deny its validity.

In *Weed v. The Saratoga and Schenectady Rail Road Co.*, (19 *Wend.* 534,) the action was to recover the value of a trunk and its contents, lost on the rail road somewhere between Saratoga and Albany. And the court held that the defendants, though their rail road terminated at Schenectady, were liable for the loss, even though it occurred at a point beyond the limits of their road, if they had contracted to carry the whole distance; and that having held themselves out to the public as common carriers for the entire route, and having received compensation for the whole distance, they were bound by their contract and estopped from denying its binding force.

In *Hart v. The Rensselaer and Saratoga Rail Road Co.*, (4 *Seld.* 37,) the defendants were held liable for baggage put on board at Whitehall, and lost somewhere between Whitehall and Troy, although the distance between those termini was traveled by three distinct rail roads, and the defendants' road embraced only the latter end of the route; the proof being that the contract was made with the Saratoga and Washington Rail Road Company at Whitehall for the entire distance, and that the three different rail road companies acted under a mutual contract, by which they agreed to carry the entire distance and divide the profits between them.

In *Cary v. Cleveland and Toledo Rail Road Co.*, (29 *Barb.* 35,) this court enforced a similar rule, under similar circumstances; the only difference being, that the action was brought against the first of the three companies interested in the contract, and who made the contract and received the baggage; and that the loss occurred beyond the bounds of the state where the rail road was chartered, and of course beyond the limits to which its powers as conferred by such charter extended.

In *Bissell v. The Michigan Southern and Northern Indiana Rail Road Co.*, (22 *N. Y. Rep.* 258,) the defendants

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were held liable for an injury to a passenger, occurring by the negligence of their agents in Illinois, while the defendants were operating a rail road route from Chicago to Lake Erie, the injury occurring at a point beyond either of the states of Michigan or Indiana, by which states alone the defendants' companies were respectively chartered, and under which charters alone they had the power to act. The general question of the liability of rail road companies for their contracts and their torts was largely and learnedly discussed; and although the views of members of the court did not entirely harmonize as to the grounds upon which the judgment should proceed, they nevertheless held that the defendants were either liable for the breach of a contract which they had lawfully made or were estopped to deny, or for a breach of duty to an individual received into their cars with their knowledge and consent, and whom, thus receiving, they were bound to transport with reasonable prudence and care.

The same question was further discussed in the subsequent case of *Parish v. Wheeler*, (22 N. Y. Rep. 494,) and it was there held that, though a rail road corporation exceeded its legal powers in the purchase of certain canal boats and a steamboat, intended to promote and facilitate the business of their road, the corporation nevertheless by the purchase acquired a title to the property, and could not, nor could any one claiming under them, set up such violation of duty to defeat the title of a mortgagee thereof; and further, that the corporation could not defend itself against a claim for money paid at its request to one who advanced the money for the price of the steamboat purchased for it, on the ground that the purchase was *ultra vires*; although the plaintiff, when he paid the money, knew all the facts; nor on the other hand would the plaintiff, having sold the steamboat under his mortgage, refuse to credit the proceeds, on the ground that the transaction which furnished the consideration of the mortgage was *ultra vires* on the part of the corporation.

A distinction is attempted to be raised between these cases

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and the one at bar, upon the ground that in those cases the business was strictly a rail road business, while here it was a stage business ; but I am inclined to regard it a “distinction without a difference.” The contracts, in all of these cases, seem to me to be as much *ultra vires* (if so at all) as in the case at bar. They had strictly no power to contract for rail road operations, or rail road liability, beyond the bounds of their respective routes and states. It is true their business was in its nature a legitimate rail road business. But I have endeavored to show, in a previous part of this opinion, that the business pursued by the defendant on this occasion was a legitimate rail road business—not done exclusively *on* its rail road, to be sure—but connected with it and appurtenant to it—incidental entirely to rail road transportation—done to advance that interest by concentrating travel and freight at the rail road station by other means and appliances, within a narrow circle of territory in the immediate neighborhood, and not designed to set up an independent and substantive business, competing with other interests, disconnected with and dissimilar to the legitimate rail road operations for which it was chartered.

III. But suppose the contract and business in question to be unlawful, in the sense that it exceeded the powers granted by its charter, is the defendant released from liability? On this subject several considerations seem to me to be worthy of notice, and to possess considerable force.

1. The defendant had been *long* engaged in this stage business—indeed, ever since it had existed as a corporation. This appears from the evidence. It must be *presumed* to have been *known* to the stockholders, who never in any way arrested it.

2. It must also be presumed, from the absence of evidence to the contrary, that the stockholders participated in the benefits of this arrangement, and thus approved and *adopted* the unauthorized acts of their directors and managers. In this particular instance they did the same thing as *taking* the

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money of the plaintiff and agreeing to transport him safely to Troy.

3. I incline to think—under the authorities before quoted, and the general principles of law—that it is *estopped* from denying its liability for the acts of its agents, as much as a party would be who, knowing that a note was infected with *usury*, and therefore void, nevertheless represents it as valid business paper, on the faith of which representation it is taken. (*Watson v. McLaren*, 19 *Wend.* 357. *Holmes v. Williams*, 10 *Paige*, 326. *Clark v. Sisson*, 4 *Duer*, 408. *Truscott v. Davis*, 4 *Barb.* 495. *Chamberlain v. Townsend*, 26 *id.* 611.)

4. At all events, receiving the plaintiff into its stage with its consent, it was under a duty to transport him with ordinary care, and are responsible for a neglect of that duty. (*Bissell v. M. S. and N. I. R. R. Co.*, 22 *N. Y. Rep.* 258.)

This latter point was not presented at the trial, nor ruled by the court, and there is some doubt, perhaps, whether it ought to be employed here to prevent a new trial, although I do not see why, if well taken, it will not be fatal to the defendant's case, if the weight of evidence on the question of negligence be conceded to be with the plaintiff. The essence of the charge was, that the defendant was liable for negligence in the conveyance of the plaintiff.

I am prepared, however, if necessary, to rest the affirmation of the judgment upon the grounds taken by the judge at the trial.

The judgment should be *affirmed*.

PECKHAM, J. concurred in the result of the foregoing opinion.

GOULD, J. expressed no opinion.

Judgment affirmed

[ALBANY GENERAL TERM, March 8, 1862. *Gould, Hogeboom and Peckham*, Justices.]



THE PEOPLE *vs.* ALMON D. FELTON.

An indictment being found against C., he was, on the 6th of June, 1860, arraigned in the court of oyer and terminer, and pleaded not guilty. Bail was fixed at \$700, and C. as principal and F. as surety were recognized for the appearance of C. at the next oyer and terminer, in October, to answer the indictment, by an entry made in the minutes of the court, which merely recited the arraignment of C. upon the indictment, and that he was ordered by the court to enter his recognizance in the sum of \$700, and that thereupon C. was recognized in that sum as principal, and F. as surety. C. appeared at the oyer and terminer in October, when another indictment was found against him, and filed on the morning of the 10th of October, for the same offense charged in the previous indictment. On the afternoon of the same day a third indictment was found, C. was arraigned thereon, and pleaded not guilty, and on motion of the district attorney, an order was entered in the minutes, quashing the first two indictments. C. then departed from the court without its express permission. On the next day an order was entered, directing the recognizance of June 6, to be written out in full and attached to the minutes as of that date, and that the minutes and entry of such recognizance be corrected, &c. Thereupon another order was entered, directing such recognizance to be estreated, and prosecuted. The clerk, pursuant to the order, drew up from his minutes a recognizance, as of the 6th of June, and attached the same to the minutes kept by him at the June term, and also to the book of records, by pasting the same therein. In an action upon such recognizance; *Held*, 1. That the entry in the minutes of the court was defective in not stating the acknowledgment of indebtedness, and therefore no legal recognizance was entered into by C. and F. 2. That the entry being defective, there was no memorandum from which to make up a recognizance, and hence there was nothing on which to base the action. 3. That the court had not authority, *ex parte*, to manufacture an undertaking imposing obligations upon the accused and his surety never assumed by them. 4. That quashing the indictment which the accused had given bail to appear and answer, was a discharge of the obligation, released the surety, and authorized the prisoner's departure from court without special leave. Bockes, J. dissented.

THIS action was brought upon a recognizance claimed to have been entered into by the defendant as surety for one Andrew J. Curtis, to appear and answer an indictment. Upon the trial, it was established by the finding of the jury that an indictment was pending against said Curtis for aiding a prisoner to escape from states prison, and that on the 6th

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day of June, 1860, he was arraigned in the court of oyer and terminer then being held in Clinton county, and pleaded not guilty; that bail was fixed at \$700, and that said Curtis as principal, and said Felton as surety, were recognized for the appearance of the accused at the next oyer and terminer, by an entry made in the minutes of the court, in the words following :

“ *The People agst. Andrew J. Curtis.* Defendant arraigned upon an indictment against him for aiding prisoners to escape from and break Clinton prison ; pleaded not guilty, and the court ordered the defendant to enter his recognizance in the sum of \$700 for his appearance at the next court of oyer and terminer, to be held in and for the county of Clinton, on the first Tuesday of October next, to answer to said indictment, with one surety in like sum. Andrew J. Curtis recognized in the sum of \$700 for his appearance at the next court of oyer and terminer, to be held in and for the county of Clinton, on the second Tuesday of October next, to answer and stand trial upon an indictment against him for aiding prisoners to escape from and break Clinton prison. Almon D. Felton recognized in like sum as surety.”

Curtis appeared at the October oyer and terminer, when another indictment was found against him for the same offense charged in the former indictment, and filed on the morning of the 10th of October ; a third indictment for the same offense was found and filed in the afternoon of the same day ; on the same day Curtis was arraigned on the last indictment, and pleaded not guilty. Thereupon, on motion of the district attorney, an order was entered in the minutes of the court as follows : “ An indictment having been found against Andrew J. Curtis on the 6th day of June, 1860, and also an indictment having been found against Andrew J. Curtis on the 10th day of October, for aiding prisoners to escape from Clinton prison ; and another indictment having been found against said Andrew J. Curtis, subsequently to the finding of the two indictments above named, for the same

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offense, ordered that the two first indictments found June 6, 1860, and October 10th, 1860, against Andrew J. Curtis, be quashed." After the entry of the foregoing order, the said Curtis departed the court without its express permission.

Prior to the arraignment of Curtis on the last indictment a bench warrant had been issued on it, and placed in the hands of the sheriff; but there was no sufficient proof of any arrest under it, and therefore the court refused to submit the question of arrest to the jury.

On the 11th of October, the following order was entered in the cause, by direction of the court: "On motion of the district attorney, ordered that the recognizance of Andrew J. Curtis and Almon D. Felton, entered June 6, 1860, upon the minutes of the court as kept by the clerk thereof, be written out in full and attached to said minutes as of the time when such recognizance was taken, and that the minutes and entry of such recognizance by the clerk be so corrected as to conform to the recognizance as taken, and as of the time when such recognizance was taken." And thereupon, on motion of the district attorney, an order was made and entered as follows, to wit: "Andrew J. Curtis having been called upon his recognizance to come forth and answer to his name, and he failing to appear and make answer, on motion of H. S. Johnson, district attorney, ordered that his, Andrew J. Curtis', recognizance be estreated, and district attorney directed to prosecute the same." The clerk, pursuant to the order above set forth, drew out the following from his minutes as the recognizance entered into on the 6th of June, 1860, to wit: "You and each of you acknowledge yourselves to be indebted to the people of the state of New York, to wit: You, Andrew J. Curtis, in the sum of \$700; and you, Almon D. Felton, in the sum of \$700, to be levied of your and each of your goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following, to wit: The condition of this recognizance is such, that if Andrew J. Curtis shall appear at

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the next court of oyer and terminer, to be held in and for the county of Clinton, on the 2d Tuesday of October next, from day to day during the sitting of the said court, then and there to answer and stand trial upon a certain indictment against him for aiding prisoners to escape from and break Clinton prison, not to depart the court without leave, and to abide its order and decision, then this recognizance to be void, otherwise to remain in full force and virtue. Are you and each of you content? To which they answer, aye." This recognizance, as drawn out, was on a separate piece of paper, and was on the 11th of October attached to the minutes kept by the clerk at the June oyer and terminer, and also to the book of records, by being pasted therein.

At the close of the proofs each party asked judgment. The court ordered judgment for the plaintiff.

*H. S. Johnson*, for the plaintiff.

*G. M. & G. H. Beckwith*, for the defendants.

JAMES, J. The defendant claims that the judgment below should be reversed, for the following reasons: 1st. Because the entry in the minutes of the court, on the 6th of June, 1860, did not amount to a recognizance, and therefore the defendant had not entered into any obligation. 2d. If the recognizance, as drawn out and entered on the 11th of October, is relied upon, it is void. The court had no power nor jurisdiction of the person of the defendant, which warranted the entry of such order; and such recognizance so entered, particularly after the indictment was quashed, was wholly unauthorized and void. 3d. If there was a valid recognizance taken on the 6th of June, when the indictment on which it was founded was quashed, the recognizance ceased and became void. 4th. That Curtis was arrested under the third indictment and taken out of the custody of the bail, whereby the bail was released.

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A recognizance is defined by *Bouvier* to be an obligation of record, entered into before a court or officer, duly authorized for that purpose, with a condition to do some act required by law, which is therein specified. Our revised statutes declare that "all recognizances required or authorized to be taken in any criminal proceeding in open court by any court of record, shall be entered in the minutes of the court, and the substance thereof shall be read to the person recognized. All other recognizances, &c. shall be in writing, and subscribed by the party to be charged," &c. (2 R. S. 746.)

The recognizance on which this action was brought was taken in open court, and the most that can be said for the entry in the minutes from which it was drawn up is, that it properly entitled the cause, stated the penalty, the court before which the accused was to appear, together with the time and place, the indictment and the offense; but it did not contain any acknowledgment of indebtedness to the people of the state. In this particular the case is within the construction given to similar entries in the cases of *The People v. Rundle*, (6 Hill, 506,) and *The People v. Graham*, (1 Parker's Cr. R. 141.) In the first case the court say, "the entry produced does not amount to a recognizance; there is no acknowledgment of indebtedness to the people of the state." In the second case the court said, "all the substantial parts of the recognizance—such as the acknowledgment of indebtedness, the *indictment*, the offense charged, the condition, &c.—should have been entered in the minutes of the court." Clearly then, unless the recognizance, when drawn up in form, can go beyond the entries in the minutes of the court, no legal obligation was entered into by the defendant on the 6th of June. The requirements of the statute were not complied with at that time, and the entry in the minutes did not amount to a recognizance.

The most important question is, had the court authority and jurisdiction to direct the entry of the order, made on the

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11th of October, setting out a full and complete recognizance against the accused and his surety.

That the court has power to correct clerical errors, or to amend its records on proper notice to the parties interested, is not disputed. But the order and entry in this case cannot be regarded as an amendment. If binding, it imposes new obligations upon the accused and his surety. It declares they acknowledged themselves indebted to the people of the state, which is not true; and unless it was true, the oyer and terminer could not, by any ex parte proceeding, impose that obligation upon them, even though it were the intention of the recognitors to have assumed such obligation and they supposed they had. (*Ontario Bank v. Mumford*, 2 Barb. Ch. Rep. 613.)

The attention of the court, in this connection, was particularly called to the remark of Justice Bronson at the close of the opinion in the case of *The People v. Rundle*, (*supra*), when, after disposing of the case, he said: "If it (the recognizance) was not utterly void, it was at the most only a memorandum from which the record of a recognizance might have been drawn up." By reference to the case, it will be seen a recovery was sought upon the minutes of the court, without producing a record properly made up. The court first held that the entry did not amount to a recognizance, and pointed out its defects, and then said, "if not utterly void, it was at most only a memorandum from which a record might have been drawn up;" not intending to intimate that such entry might be the foundation of a legal record, but only that a perfect and valid entry was but a memorandum from which a record might be made, and from which one should be made before a recovery could be had by action.

It was further urged that this record could not be impeached collaterally; that it imported absolute verity. The difficulty in the case is that the defect appeared in the records of the court; in the minutes which were the foundation of the recognizance on which the plaintiffs sought to recover.

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But conceding the entry in the minutes to have been sufficient, and the recognizance legal and binding, when the indictment specified in the recognizance was quashed, the obligation was discharged and the surety released.

The condition of the undertaking was that the accused should appear at a time and place specified, to answer an indictment therein stated; and when the accused appeared in fulfillment of that undertaking, and that indictment was quashed in open court in his presence, on motion of the district attorney, it was a discharge of the recognizance, and a permission for the prisoner to depart. An acquittal of such indictment, on trial, would most certainly operate as a discharge of the recognizance, and no special leave for the prisoner to depart would need be asked of the court, in order to release the surety from his obligation; and this would be so even though the undertaking, as in this case, contained the clause that the accused should not depart the court without leave, &c.

In a recognizance to answer an indictment, that clause has no force, beyond answering the particular charge named; (*The People v. Stager*, 10 *Wend.* 434;) while in a matter before indictment it has force, and is important, to detain the accused until the court shall know what charges are to be brought against him, and in order that the prosecuting officer may have the same control over him, for all offenses brought against him, as the prosecutor would, had the accused remained in the custody of the sheriff. In the one case the recognizance is to answer a particular charge; in the other it is to answer what may be alleged against him before the grand jury. In this case the grand jury had investigated the complaint, presented their finding in the form of an indictment, the prisoner had been arraigned, the charges read to him and he pleaded thereto; thus forming an issue which was placed upon the record for the court to try; and a recognizance that the "prisoner should appear and stand trial upon that indictment, and not depart the court without leave, but abide its

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order and decision," was satisfied by an appearance and discharge of the indictment ; and cannot be converted into an obligation that the accused should remain to see if any other indictment was to be found, unless formally discharged by the court. The surety at least assumed no such responsibility ; as to him the obligation was single in its purpose, and fully satisfied when the indictment was discharged.

This construction will not conflict with the cases of *The People v. Stager*, (10 *Wend.* 434,) and *Champlain v. The People*, (2 *Com.* 82,) nor with what, in the former case, was approved from Hawkins' Pleas of the Crown. In both cases the question arose upon a recognizance to answer charges to be preferred, and not upon indictment. So in the case quoted from Hawkins. The cases from this state both arose upon demurrer ; the first to the pleas and the latter to the declaration. In the first, the plea of rearrest was held good ; while a plea that the prisoner appeared at the time and place, and was ready to answer, was held bad. In the second case the declaration was held bad, because it did not contain an averment that an indictment was found at the sitting of the court at which the accused was bound to appear. In the citation from Hawkins, it is true the liability is put upon the express ground that the recognizance contained the clause that the accused should not depart until he had been discharged by the court ; but, as I have previously said, that was a recognizance to answer an information, not an indictment ; although an information at that time did not differ from an indictment, in form and substance, except that it was filed at the discretion of the law officer, without the intervention or approval of a grand jury. Still, in such case, no arraignment had been made, no plea to the charge had, no issue formed ; the recognizance was in character precisely what such an obligation now is when a person has been held over by an examining magistrate to answer a charge to be preferred.

It is a sufficient answer to the point, that the undertaking was discharged by the rearrest of the accused on the subse-



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quent indictment, to say that no such arrest was proved. The testimony on that branch of the case, instead of proving an arrest, proved the reverse, and hence the court was right in refusing to submit that question to the jury.

From these premises my conclusions are:

First. That the entry in the minutes of the court was defective in not stating the acknowledgment of indebtedness, and therefore no legal recognizance was entered into by the defendant.

Second. That the entry in the minutes of the court being defective, there was no memorandum from which to make up a recognizance, and hence there was nothing on which to base the action.

Third. That the court had not authority, *ex parte*, to manufacture an undertaking imposing obligations upon the accused and his surety never assumed by them.

Fourth. That quashing the indictment which the accused had given bail to appear and answer, upon the motion of the prosecuting officer and in the presence of the accused, while there to answer, was a discharge of the obligation, released the surety and authorized the prisoner's departure from court without any special permission or order therefrom.

The judgment should be reversed, and a new trial granted; costs to abide the event.

ROSEKRANS, J. and POTTER, J. concurred.

BOCKES, J. dissented.

Judgment reversed.

[WARREN GENERAL TERM, July 10, 1860. *Rosekrans, Potter, Bockes and James*, Justices.]

WRIGHT *vs.* PAIGE.

Words charging one with keeping a whore house are actionable, *per se*. They impute a crime involving moral turpitude, and which crime is also an indictable offense.

The charge of keeping a whore house is synonymous with a charge of keeping a bawdy house, or house of ill fame; it being a charge of keeping a house for common prostitution.

In an action for slander, the words are to be construed according to their common acceptation; and it is not admissible to inquire of the witnesses how they understood them.

After impeaching witnesses are shown to be acquainted with the general moral character of the person whose credit is assailed, and they declare it bad, the question of credit is for the jury, under proper comments from the court, without any inquiry of the discrediting witnesses as to whether they would believe him under oath.

In such cases the jury ought not to be precluded from drawing the fair and reasonable inferences from the evidence.

THIS was an appeal from a judgment entered at a special term, after a trial by a jury, at the circuit. The action was for slander. The words set out in the complaint were the following:

“Ah! you (meaning plaintiff) damned scoundrel, I (meaning defendant) will see the end of you yet. There is nothing of you; you have nothing but whores about you; you (meaning plaintiff) keep a whore house; you have brought up two girls whores; now you have another you are bringing up the same way. Go home and take care of your whores.” He, the said defendant, thereby then and there imputing and intending charging, and intending to charge, falsely and maliciously, that the plaintiff had been and was guilty of the odious crime, offense and misdemeanor of keeping a bawdy house, &c. The plaintiff recovered a verdict for \$400 damages.

*Isaac W. Thompson*, for the appellant.

*O. F. Davis*, for the respondent.

*By the Court*, BOCKES, J. Appeal from a judgment. The action is for slander. The words charged, among other op-

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probrious epithets, were that the plaintiff kept a whore house. No special damage is alleged, nor does it appear that any was proved or attempted to be proved. The plaintiff proved the uttering of the words by the defendant, and had a verdict in his favor

It is urged that the words are not actionable, *per se*. In *Martin v. Stillwell*, (13 John. 275,) the words were, "Mrs. Martin kept a bawdy house." Held actionable. This case is referred to and approved in *Young v. Miller*, (3 Hill, 21,) where Judge Bronson remarks that such a house is a common nuisance, and the person keeping it may be punished by indictment; and after citing some other cases, he adds: "In all these cases the court proceed on the ground that the words impute a crime involving moral turpitude, and for which the offender may be proceeded against by indictment."

Words, to be actionable *per se*, must impute a crime involving moral turpitude punishable by indictment. It is not enough that they impute immorality—moral dereliction merely—but the offense charged must be also indictable. At one time it was supposed that the charge should be such as, if true, would subject the party charged to an infamous punishment; and it was so urged in *Widrig v. Oyer*, (13 John. 124.) But the court declined to so hold. And in *Martin v. Stillwell*, (*supra*,) it was laid down that if the words imputed moral turpitude, and charged an indictable offense, they were actionable, although the offense charged could not be punished by an infamous punishment. So in *Alexander v. Alexander* (9 Wend. 141) it was held sufficient if the words charged would, if true, subject the party to criminal punishment of any description. The case is cited, and the rule was approved and adopted in *Young v. Miller*.

The offense charged in *Young v. Miller* was but a misdemeanor, not a felony; but the words imputed a crime involving moral turpitude, and for which the offender might be proceeded against by indictment. The words were held actionable. In *Bush v. Prosser*, (13 Barb. 221,) a recovery

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was allowed in slander for charging the plaintiff with keeping a bawdy house, or house of ill fame.

In this case the words charged are, that the plaintiff kept a whore house; and the complaint contains an innuendo alleging that the defendant by such charge falsely and maliciously imputed to the plaintiff the crime and offense of keeping a bawdy house. The court was requested to charge, and did charge, the jury that in order to sustain the action they must find that the defendant intended, by the words counted on and proved, to charge the plaintiff with what was equivalent to keeping a bawdy house for public prostitution. This certainly was going quite as far as the defendant had any right to ask. The charge of keeping a whore house is synonymous with a charge of keeping a bawdy house, or house of ill fame.

The words are to be taken in their natural meaning, and according to common acceptation; in other words, according to their plain and natural import. (*Carroll v. White*, 33 Barb. 615, and cases there cited.) By common acceptation, to keep a whore house is to keep a bawdy house, or house of ill fame. Indeed, to charge the former is equally opprobrious and more directly and unquestionably significant, if possible, than to charge the latter. It is a coarser expression, conveying the same idea. It is most clearly a charge of keeping a house for common prostitution; which is the precise definition of a bawdy house. It is needless to say that such charge imputes a crime involving moral turpitude. This crime is also an indictable offense.

A bawdy house is a common nuisance, and the person keeping it may be punishable by indictment. (*The People v. Jackson*, 3 Denio, 101. *The People v. Erwin*, 4 id. 129. *Young v. Miller*, 3 Hill, 21.) By the statute the offense is punishable with imprisonment at hard labor, and on bread and water. (1 R. S. 638, §§ 1, 2, 10.) It is therefore clear, on principle and authority, that the words charged in the complaint, and for which a recovery was allowed, were action-

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able. The objection that the complaint did not contain a cause of action, and the exception to the refusal of the judge to charge the jury that the plaintiff had not charged or proved a cause of action, were not, nor was either, well taken.

The defendant requested the court to charge the jury, that inasmuch as the witnesses had not sworn that they understood the defendant to mean by the words spoken, that the plaintiff kept a bawdy house for public prostitution, the plaintiff had failed to show actionable words. The court properly refused so to charge. As has been said, the words were to be construed according to their common acceptation. It was for the witness to state them and the circumstances under which they were uttered, and their import was for the court and jury. It is not admissible, on the trial of an action of slander, to inquire of the witnesses how they understood the charge. (*Gibson v. Williams*, 4 Wend. 320. *Van Vechten v. Hopkins*, 5 John. 211.) The court decided correctly in refusing to charge as requested.

It seems that an attempt was made to impeach a witness produced by the defendant, by whom he sought to prove a justification of the slander. In fact no justification of the slander whatever was shown by her, and the evidence was entirely immaterial on that issue. But it was not objected to, and if credible bears, perhaps, on the plaintiff's character, and in that way was of some importance on the question of damages. I will therefore examine the exceptions interposed to the ruling of the judge, on that branch of the case, without deciding however that the evidence was admissible, had it been objected to.

On the question of impeachment, evidence was given showing that the general moral character of the witness was bad, and that her general character for honesty and integrity was bad; also that she was reputed to be unchaste and to possess a disposition to steal; and that she kept a place for the sale of liquors, which was the resort of vile characters. The witnesses were not asked whether they would

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believe her under oath. No evidence was offered to sustain the witness, nor was any objection taken to the sufficiency or completeness of the impeaching testimony, until the summing up by the counsel to the jury, when it was insisted that the impeachment was ineffectual, inasmuch as no one had sworn that he would not believe the witness under oath. The court charged the jury that they would take into consideration the manner of the witness when testifying, the nature of her evidence, whether or not consistent, and also the evidence of the witness called to impeach her general moral character, and determine whether they would believe her statement; and that it was not necessary, under the circumstances of the case, in order to impeach her, that the witnesses who testified to her general moral character, should have been asked whether they would believe her under oath. To the latter clause of this charge the defendant's counsel excepted, and requested the court to charge, that inasmuch as it had not been proved that the witness, by whom her character was shown to be bad, would not believe her under oath, she was not impeached, and that the impeaching testimony in that behalf was of no force. The court declined so to charge. The learned judge was manifestly right, both in his charge and refusal.

As to the charge, it was not necessary, *under the circumstances of the case*, to ask the impeaching witnesses whether they would believe her under oath, if indeed it be necessary under any circumstances, for the purpose of a successful impeachment. The attention of the jury was called to the conduct of the witness while under examination, her manner of giving evidence, its probability or consistency, from which we are to infer that these were proper subjects of remark; especially must we so infer, as there was no exception to this part of the charge. If her conduct and manner of testifying were insincere or reckless, and her statements improbable and contradictory, this would be enough to authorize the jury to discredit her. Circumstances attending the examination of

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a witness may, without countervailing proof, become so overwhelming as utterly to destroy his evidence.

It was not necessary, therefore, to the impeachment of this witness, that another should swear that he would not believe her under oath; nor was it any the more necessary, for the reason that several witnesses had also sworn that she was of notoriously bad moral character.

As regards the request to charge, that the witness was not impeached because it was not proved that the persons by whom her moral character was shown to be bad would not believe her under oath, it is sufficient to say that she stood impeached, perhaps, by other evidence than that given by these witnesses. At any rate, there was other evidence tending to her impeachment, and hence it would have been improper to charge as requested. As part of the same proposition, the judge was requested also to charge that the impeaching testimony in that behalf had no force. The request must stand or fall as an entirety, and if any part of it was improper the judge was right in rejecting it. A proposition on which a judge is asked to charge must be good in all its parts, both as to the law and facts, or he may refuse to give the instruction asked for; and he may do so without qualification. (*Doughty v. Hope*, 3 Denio, 594; same case on appeal, 1 Comst. 79. *Zabriskie v. Smith*, 13 N. Y. Rep. 322. *Cronk v. Canfield*, 31 Barb. 171. *Haggart v. Morgan*, 5 N. Y. Rep. 422. *Magee v. Badger*, 30 Barb. 246. *Jones v. Osgood*, 6 N. Y. Rep. 233. *Van Kirk v. Wilds*, 11 Barb. 520.) In this view, therefore, the learned judge very properly declined to charge as requested.

But suppose the impeachment to rest solely on the evidence of those persons by whom the moral character of the witnesses was proved to be reputedly bad, was the impeaching testimony "of no force" without showing further, by those persons, that they would not believe the witness under oath? On the question of general impeachment, the credibility of a witness is to be determined from general character.

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After one has so conducted in community that he has earned the reputation of being a person of notoriously bad character, he is open to discredit in a court of justice. This is the common sentiment of mankind. But the point here is as to the kind and extent of proof necessary to the submission of the question to the jury, in case of an attempted general impeachment. The mode of establishing a general impeachment of a witness is by an examination into his character—his moral standing in community. The inquiries should be made of his neighbors, or those acquainted with his reputation and standing. An inquiry, however, is not allowed as to any particular offense, species or class of crimes or immoralities. As was said in *Bakeman v. Rose*, (18 Wend. 146,) you cannot inquire whether the witness has the general reputation of being a thief, prostitute, murderer, forger, adulterer, gambler, swindler, or the like; although each and every of such offenses, to a greater or less degree, impairs the moral character of the witness, and tends to impeach his or her veracity. But the inquiry must be general in its scope and tendency. What should be the question in such case, both as regards substance and form; has often been matter of grave discussion. In *Phillips on Evidence*, (see text,) the rule is stated thus: The regular mode of examining into the general character of a witness is by inquiring of the witnesses, who are called to impeach it, whether they have the means of knowing his general character, and whether with such knowledge they would believe him on his oath. In *Cowen and Hill's Notes* we find it said, that in general the proper question is whether the discrediting witness knows the general character of the witness sought to be impeached, in respect to truth, among his neighbors; and what that character is—whether good or bad. *Greenleaf* lays down the rule thus: The regular mode of examining into general reputation is to inquire of the witness whether he knows the general reputation of the person in question among his neigh-



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bors, and what that reputation is. *Swift*, in his treatise, remarks: The only proper question is whether he knows the general reputation of the witness in point of truth, among his neighbors, and whether it is good or bad. *Starkie* says: The only proper question is whether he would believe him under oath. It has been held that the question may be asked, what is the general character of the witness in the neighborhood where he resides, as a man of truth; and what is his general character for truth and veracity; also what his general moral character is. On looking into the books, it will be found that the courts have, first and last, given sanction to questions in each and every of the forms above stated or suggested. Not that either or all of them were the only ones which might be put, but that such questions were proper both in form and substance to be asked of the discrediting witnesses. It is well settled, too, by numerous decisions, that in addition to any or all of these questions, the witness may be asked whether he would believe the person, whose credibility is attacked, on oath. *Greenleaf*, after stating the proper mode of examination to be to inquire of the witness whether he knows the general reputation of the person in question among his neighbors; and what that reputation is, says that in the English courts the course is further to inquire whether, from such knowledge, the witness would believe that person upon his oath. But he adds, "*in the American courts the same course has not been pursued*, but its propriety has of late been questioned, and perhaps the weight of authority is now against permitting the witness to testify as to his own opinion." It is admissible, however, in this state, as in England, to superadd to other questions, the inquiry whether the witness, from his knowledge of the general character of the person, would believe him under oath. But, as was remarked by the counsel in this case, the great struggle has been to induce the courts to allow this question to be put. It is now held admissible, but is not, as I am

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aware, absolutely essential to a successful impeachment. The decision in *Gilbert v. Sheldon*, (13 Barb. 623,) does not reach this case, although I think the argument of the learned judge who delivered the opinion of the court may cover it. There the question put went merely to general character, not to general moral character; and this distinction was marked and commented on by the learned judge. If the decision in that case is to the extent that there cannot be an effectual impeachment of a person, without proving by the discrediting witnesses that they would not believe him under oath, I am unwilling to follow it.

If a person is shown to be of notoriously bad moral character, he is certainly a most unreliable witness, and in my judgment it then becomes a proper matter for the jury to determine whether they will credit his statement, without the further testimony from the discrediting witnesses that they would not believe him under oath. If they should so state, it would add very little force, if any, to the other evidence. In the case at bar, a female witness is shown to be of bad moral character—reputed to be dishonest, unchaste, wanting integrity, untruthful, thievish, and a keeper of a resort for vile characters; and the court is asked to charge the jury that she stands before them, as regards the question of general impeachment, a perfectly fair witness—in the exact language of the request, “that the impeaching testimony in that behalf was of no force,” and for the reason simply that the witnesses were not asked whether they would believe her under oath. The proposition is contrary to the dictates of reason and propriety—simply absurd.

After impeaching witnesses are shown to be acquainted with the general moral character of the person whose credit is assailed, and they declare it bad, the question of credit is then, in my judgment, for the jury, under proper comments from the court, without any inquiry of the discrediting witnesses as to whether they would believe him under oath.

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In such cases the jury ought not to be precluded from drawing the fair and reasonable inferences from the evidence.

I am satisfied that the record in this case is free from error, and that the judgment should be affirmed.

Judgment affirmed.

[CLINTON GENERAL TERM, May 6, 1862. *Rosekrans, Potter, Bockes* and *James*, Justices.]

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 BAY and others vs. GAGE.

Laws are not unconstitutional for the reason that they are retrospective. Retrospective laws which do not impair the obligation of contracts, or affect vested rights, or partake of the character of *ex post facto* laws, are not prohibited by the constitution.

The act of April 18, 1861, (*Laws of 1861, ch. 221, p. 588*), amending the revised statutes in regard to judgments in actions of ejectment, does not act retrospectively, so as to apply to judgments rendered prior to its passage.

THIS is an appeal from an order made at a special term, denying a motion for a new trial under the revised statutes, in an action of ejectment. The cause was referred to a referee and decided upon the merits, and judgment entered against the plaintiffs upon the report of the referee. The only question presented by this appeal is whether a new trial in ejectment can be granted where a judgment has been rendered on the merits upon the report of a referee. The plaintiffs claimed that they were entitled to have the judgment vacated and a new trial granted; and the defendant insisted, not only, that the plaintiffs were not entitled to an order vacating the judgment, but that the court has *no power* to vacate it and grant a new trial.

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*Clark B. Cochran*, for the appellants.

*John Stewart*, for the respondent.

*By the Court*, BOCKES, J. Prior to the act of 1861, a party against whom a judgment had been rendered in ejectment, "upon a verdict," was entitled to a new trial under the statute as a matter of right, on payment of all costs and damages recovered thereby. (3 R. S. 596, 5th ed. §§ 36, 37.) But this right to a new trial under the statute was limited to those cases where the judgment was "rendered upon a verdict." It was so held in *Christie v. Bloomingdale*, (18 How. 12;) also in *Lang v. Ropke*, (1 Duer, 701.) These cases are cited with approval in *Chautauque Co. Bank v. White*, (23 N. Y. Rep. 347.) It is plain that this limitation was intended by the legislature, in order to afford to a party relief against the accidents and misfortunes to which jury trials are peculiarly liable, and which often could not be remedied in any other way than by a statute giving a new trial as a matter of right. It was, too, a statutory boon, hence not to be extended by construction beyond the strict letter of the law; especially when it is clear that a strict construction comports with its obvious purpose and intent. But an amendment was adopted April 13, 1861, (*Laws*, ch. 221, p. 538,) striking from the statute the words "rendered upon a verdict;" thus discharging the limitation which those words had imposed. This amendment had taken effect when the application for a new trial herein was made, but the judgment was entered in May preceding its passage. The question is, therefore, whether the amendment will be construed to have application to judgments rendered prior to its passage.

It is a general rule that laws must be prospective, and cannot have a retroactive effect: and this rule should be strictly adhered to in the construction of statutes, unless it be made clearly to appear, from the statute itself or from the statute considered in connection with the subject matter to

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which it relates, that the legislature intended it to operate retrospectively. Whether a law is prospective or retrospective is a question of construction, in the absence of any express declaration in the act by which it is determined. There are, however, two classes of retrospective laws prohibited by the federal constitution, which declares that no state shall pass any *ex post facto* law, or law impairing the obligation of contracts. The clause relating to *ex post facto* laws is held to apply only to legislative action in regard to crimes and penal enactments. But laws are not unconstitutional simply for the reason that they are retrospective. Retrospective laws which do not impair the obligation of contracts or affect vested rights, or partake of the character of *ex post facto* laws, are not forbidden by the constitution. So Judge Story says, there are many laws of a retrospective character, which may yet be constitutionally passed by the state legislature, however unjust, oppressive or impolitic they may be. The amendment under consideration, even if it be retroactive in its effect, is most clearly not within the prohibition imposed by the federal constitution. The legislature of Connecticut passed a resolve setting aside a decree of a court of probate disproving a will, and granted a new hearing. It was held that the resolve was not prohibited by the federal constitution, and was valid. (*Colder v. Bell*, 3 *Dallas*, 386.) But see remarks of Jewett, J. on this case in *Burch v. Newbury*, (10 *N. Y. Rep.* 374, 394, 5.) In Maine it was held that the act granting writs of review on judgments against certificated bankrupts was not in violation of the federal constitution, and was a valid law. (*Colby v. Dennis*, 36 *Maine Rep.* 9.) But I am persuaded that the amendment is not retrospective by its terms or by fair construction. To give it that effect, either the statute should so declare, or such should be the undoubted or necessary inference. Considerations of propriety as to the right of reviewing judgments are not sufficient to raise the presumption that the law was intended to act

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upon judgments previously recovered. So it was held that the statute which authorized a writ of error in behalf of the people, to review a judgment rendered in favor of a defendant, did not authorize such writ to review a judgment rendered prior to its passage. (*The People v. Carnal*, 2 *Selden*, 463.) To the same effect was the decision in *Watkins v. Haight*, (18 *John*. 139.) See also *Hughes v. Lumley*, (82 *Eng. Com. Law Rep.* 358 ;) *Vansittart v. Taylor*, (*Id.* 910.) The amendatory act under consideration declares that section 36 is hereby amended so as to read as follows : then follows the section as in the revised statutes, except that the words "rendered upon a verdict" are omitted. There are no words inserted declaring that it should act retrospectively ; nor does the statute as amended necessarily raise a presumption that it should so operate. The case of *Ely v. Holton* (15 *N. Y. Rep.* 595) seems entirely conclusive of the question. In this case section 11 of the code was declared to be amended so as to read as follows : after which follows the section as amended. It was contended that the amended section should be considered as though it had been originally enacted in the same language contained in the amendment. But the court held that such was not the true construction, and Judge Denio remarked, "we consider the amendment as only equivalent to an independent statute." And in another part of the opinion he added, "The rights of the parties had been definitely settled according to the law as it existed at the time the supreme court pronounced its judgment. The case had been determined by the court of last resort in such cases, according to the arrangement of the laws then in force. Then the legislature intervenes, by declaring that judgments in that class of cases are subject to another review. But they are not to be understood by this to refer to cases where the litigation had been ended, but to actions thereafter to be prosecuted, and such as were then pending and undetermined." So it was decided without dissent, so far as appears from the reported case, that the act as amended became law only at

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and subsequent to the passage of the amendment, and was to be construed prospectively.

The order of the special term should be affirmed, with ten dollars costs.

There is a question suggested by this examination, which it is unnecessary here to discuss, inasmuch as we have arrived at the conclusion that the amended act does not operate retrospectively. Suppose the act had expressly declared that it should apply, as well to judgments theretofore recovered as to those thereafter to be rendered, would it not have been in contravention of the constitution of this state and void? Would not its effect have been to impair vested rights? In that event—to adopt the language of Jewett, J. in *Burch v. Newbury*, (10 N. Y. Rep. 396)—the act would create the means by which to open the judgment for reconsideration and adjudication upon the merits in controversy in the suit. This in effect would be to annul a complete and perfect right. See also remarks of Denio, J. above quoted. (15 N. Y. Rep. on page 600; also *Dash v. Van Kleeck*, (7 John. 489, 493, 500;) also *Wood v. Oakley*, (11 Paige, 400;) also *Denny v. Mattoon*, (2 Allen [Mass.] 361,) and note to *Van Rensselaer v. Smith*, (27 Barb. 154, (c).)

Order affirmed.

[CLINTON GENERAL TERM, May 6, 1862. *Rosekrans, Potter, Bockes* and *James*, Justices.]

INGALSBEE *vs.* WOOD.

One who leaves his horse at an inn, without receiving or asking accommodation or entertainment there, for himself, but *to the knowledge* of the innkeeper is provided for and lodged at the house of another, does not become the guest of the innkeeper.

In such a case, the innkeeper is not bound to receive the horse. If he does, he is not under the extraordinary liability which attaches to his calling or avocation, but his responsibility is that only of an ordinary bailee to whom the custody of property is intrusted for hire.

As such he is bound only to ordinary care—to reasonable diligence and good faith, in the preservation of the property. He can only be made responsible for negligence.

The relation of innkeeper and guest must exist, in all cases, or the liability of the former, as such, does not attach.

The accepting and keeping of the goods of a guest is accessory to the contract implied by law.

**A**PPEAL from a judgment entered at a special term, after a trial at the circuit. The action was brought by the plaintiff, as assignee of the owner, to recover the value of a horse, harness and robes, which were destroyed by fire in the barn connected with the defendant's inn. The action was tried at the Washington county circuit, in May, 1851, when the plaintiff was nonsuited. The facts appearing in evidence are set forth, in sufficient detail, in the opinions below.

*I. W. Thompson*, for the appellant.

*I. Gibson* and *W. H. Brown*, for the defendant.

BOCKES, J. This is an appeal from a judgment, with a case containing exceptions. On looking into the case we find that the action was tried before the court with a jury, and involved two questions of fact only; all others being admitted or undisputed. One question was whether the plaintiff's assignor was the guest of the defendant, who was an innkeeper, at the time of the destruction of the property. The other was, as to the value of the property destroyed. By the



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agreement of the parties, the former was left to be determined by the court, and the jury found on the question of value. The judge reserved the case, and finally ordered judgment for the defendant. He found, as appears from his opinion, that the plaintiff's assignor was not the guest of the defendant; but there is no formal finding to that effect on the record, and of course there is no formal exception thereto. This question having been left to the judge, should have been found by him, and formally stated on the record. Then an exception could have been interposed, under which it could be properly and regularly considered on appeal.

As the case is presented on the record, this finding of fact in favor of the defendant is by inference only, and the exception to it is by construction. In this regard the case is defective for the purposes of a review on this question. The objection, however, is not raised by the counsel. The case is put on the merits, and we should therefore disregard any technical irregularity or informality in the record.

I will therefore assume that the case stands the same as if the judge had ordered a nonsuit at the circuit, on the whole case, and directed a dismissal of the complaint, and the defendant had duly excepted to such ruling and direction.

The learned judge held, as we shall assume, that the facts proved showed that the defendant held the property, at the time of its destruction, simply as a bailee for hire; not as the property of a guest at his inn.

The facts are these. In April, 1860, the defendant was an innkeeper at Hartford, Washington county. Aaron and Lyman Ingalsbee, father and son, resided together in Kingsbury in the same county, and were joint owners of the property destroyed. On the 1st April, 1860, Lyman went to church at Hartford, with a horse, wagon, harness, robe and whip. The defendant's inn was near the church. Ingalsbee drove under the defendant's shed, fastened the horse, and without giving any directions in regard to it, and without going into the inn, went to the house of his mother-in-law,

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a few rods distant, where his wife was then staying. The horse was left there for four or five hours or more. Ingalsbee then returned, went into the defendant's bar-room, informed the defendant's servant that he had a horse under the shed, and that he wanted it put in the stable; that he was going to stay all night. The horse was then put in the defendant's stable and fed, where it remained until the following morning, when the stable was destroyed by fire and the horse perished in the flames; all without any fault of the defendant. Ingalsbee did not remain at the inn, nor did he receive for himself any entertainment there, but stayed over night at the house of his mother-in-law, with his wife, to whom he had been recently married. He had been in the habit of putting his horse under the defendant's shed, on his visits to his wife before the marriage, but never paid any thing for the accommodation.

It seems that he told the defendant's servant, when he directed the horse to be taken care of, that he intended to stay all night. By fair implication, under the circumstances, it must be assumed that he meant, and was understood to mean, that he intended to stay over night at the house of his mother-in-law, with his wife—not at the inn. The learned judge at the circuit so understood the evidence, as appears from his opinion; and the circumstances of his visit, in connection with his recent marriage, can leave no doubt of the correctness of this inference.

The case, then, when reduced, is simply this: Ingalsbee went on a visit to his wife, then stopping in a neighboring town, at her mother's house, a few rods from the defendant's inn. He went to the inn and directed his horse to be cared for, with the understanding, however, (for I think this is fairly, indeed necessarily, to be inferred from the proof,) that he was to remain and have accommodation and entertainment elsewhere, and in fact had not any entertainment whatever for himself at the inn.

Was he a guest at the inn?

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An innkeeper is subject to extraordinary liability, and a person claiming to enforce such liability must show a case clear, beyond all reasonable doubt. This extraordinary liability is based on grounds of public policy, and carries with it a supposed equivalent or corresponding right in favor of the innkeeper, by way of lien or security on goods placed by a guest under his charge. He is bound to receive travelers, and to afford to them entertainment, and to a certain extent is the insurer of the goods of his guest. So it has been said that the law, on account of this duty and extraordinary liability, gives the innkeeper a lien on the goods of his guest for the satisfaction of his reasonable charges; and further, that the lien and liability must stand or fall together.

It has been often held, too, that a livery stable keeper who keeps, or the farmer who pastures the horses or cattle of another, has no lien for the keeping, without a special agreement to that effect. And so it is also decided that where horses were left with an innkeeper by a neighbor, for the purpose of being fed and kept, he had no lien, and for the reason that they were not placed there by or as the property of a guest. (*Grinnell v. Cook*, 3 Hill, 485. *Binns v. Pigot*, 9 Car. & Payne, 208.) How does the case at bar differ from this? Ingalsbee was not a traveler. He had arrived at his destination, and had taken up a temporary abode—had become a sojourner at the house of his mother-in-law. He accepted entertainment and accommodation there. If the guest of any one, he was her guest. He did not receive, nor did he contemplate, any favor at the inn, by way of personal entertainment there. All he desired or contracted for was provender and protection for his horse, while he visited and was entertained elsewhere. Suppose his mother-in-law had sent the horse to the inn, to be kept and fed for the night; would this have made her a guest at the inn? Certainly not; nor would it have made Ingalsbee, to whom this would have been an accommodation, a guest there. It can make no difference that Ingalsbee went himself, when his

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character was known to be that of a visitor or guest at a neighbor's house. He was no more a guest at the inn than if he had sent his horse there by a servant of his mother-in-law, to be kept and fed for the night, with no purpose or intention of going there himself for personal entertainment. Judge Bronson says, that when the owner has never been at the inn, and never intended to go there as a guest, it seems little short of downright absurdity to say that in legal contemplation he is a guest. And he adds, "if our lawgivers had intended that the innkeeper should be answerable, as such, for every thing he received in charge, guest or no guest, they would have said so. They would not have taken the roundabout way of saying that he must answer for the goods of the guest, and that every one is a guest who has goods in his hands." So a neighbor who does not have or seek personal entertainment at an inn, is not a guest there, although he puts property under the charge of the innkeeper. Nor will any one become a guest simply from such transaction. He must also be a traveler, within the meaning of the law, or have personal entertainment or accommodation as such. The accepting and keeping of the goods of a guest is accessory to the contract implied by law.

If a traveler have no personal entertainment or accommodation at the inn except simply care and food for his horse, he would doubtless be a guest there; for he makes the inn his temporary abode—his home for the time being. In that case he is, with his property, "*infra hospitium*." Not so, however, with the person who has his personal entertainment—his abode—and is in the actual enjoyment of a home elsewhere. In such case there is no implied contract between the parties, creating the relation of innkeeper and guest, and consequently no principal agreement to which the keeping and feeding of animals can be accessory. If, therefore, an innkeeper receive the goods and chattels of another, not his guest, he is not under the extraordinary liability which at-

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taches to his calling or occupation, but is responsible only as an ordinary bailee.

The appellant's counsel relies on *Mason v. Thompson*, (9 *Pick.* 280,) *Yorke v. Greenough*, (2 *Ld. Ray.* 860,) and *Robinson v. Walter*, (*Poph. Rep.* 127.) It is enough to say that these cases are considered in *Grinnell v. Cook*, (3 *Hill*, 485,) and that the doctrine of *Mason v. Thompson*, which was supposed, but erroneously, to receive support from the other two cases cited, is distinctly repudiated. It will be found on examination of *Yorke v. Greenough*, and *Robinson v. Walter*, that the criticism upon them in *Grinnell v. Cook* is well sustained. The conclusion arrived at in the case last cited is, that *Yorke v. Greenough* and *Robinson v. Walter* do not afford a precedent for the rule laid down in *Mason v. Thompson*. And Judge Bronson, delivering the opinion of the court in *Grinnell v. Cook*, sums up by saying that he feels no disposition to follow that case. But the decision in that case must stand as good law or the case of the appellant at bar must fall. The cases are strikingly similar. In *Mason v. Thompson* the plaintiff's bailee stopped as a visitor with a friend, and sent the horse, harness and carriage to the inn. While there the harness was stolen. The defendant was held liable, and it was laid down in that case that if a person commits his horse to an innkeeper to be fed he is a guest, although he do not himself lodge or receive any refreshment at the inn. But, as has been seen, the reverse of this is the law of this state. It is said to have been held by Judge Nelson, in *Peet v. McGraw*, (25 *Wend.* 654,) that it was not necessary to the lien or liability of the innkeeper that the owner should be a guest. But Judge Bronson, who formed one of the court which pronounced that decision, says the case decides no such thing, (3 *Hill*, 488,) and that such deduction was improperly made from an expression of Mr. Justice Nelson not necessary to the decision of the case.

We are not therefore at liberty to say, against the authority of *Grinnell v. Cook*, that a person who puts his horse at

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an inn is a guest, when he neither receives nor asks accommodation or entertainment there, for himself, but to the knowledge of the innkeeper, is provided for and lodged at the house of another. In such case the innkeeper is not bound to receive the horse ; and if he does, his responsibility is that only of an ordinary bailee to whom the custody of property is intrusted for hire. As such he is bound only to ordinary care, to reasonable diligence and good faith in the preservation of the property. He can only be made responsible for negligence. In this case, it is admitted that the injury did not occur from any fault of the defendant ; hence there rests upon him no liability.

It is argued that even if Ingalsbee were the guest of Wood, still no liability attached to him for the loss of the property, inasmuch as it stands admitted that it was destroyed by fire without any fault or negligence on the part of the defendant. In other words, that an innkeeper may protect himself against the claim of his guest for the loss of his goods by fire, by showing that the loss occurred without any fault on his part. We are cited to *Merritt v. Clayborn* (23 *Verm. Rep.* 177) in support of this position. We deem it unnecessary to examine this question here. The case seems conclusively against the plaintiff on the point above discussed.

The judgment should be affirmed.

POTTER, J. The defendant can be made liable only on the ground that he was an innkeeper, and that as such he would have had a lien upon the horse and other goods left with him, for the keeping of the horse. I think the law is that if the defendant could have enforced a lien upon the property on his part for the keeping of the horse, then his liability to respond for the loss of the property clearly follows. The *lien*, and *liability*, stand or fall together. (*Grinnell v. Cook*, 3 *Hill*, 498, *per Bronson, J.*)

The liability of an innkeeper to his *guest*, like that of a common carrier to his employer, is not discharged by his

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showing that the fire was owing to no fault of his ; but to an accident. (*Hyde v. The Navigation Company*, (5 Term R. 389.)

The only question, then, really necessary to be discussed is, whether the facts in this case establish the relation of *innkeeper* and *guest*, between the defendant and Lyman Ingalsbee. Upon principle, I should not hesitate to hold that the relation did not exist in this case. It did not *actually* exist ; that is clear. Ingalsbee, on that occasion, was furnished with neither room, lodgings, food, drink, nor any other single comfort or service, that is ever *personally* furnished to the *guest* of an innkeeper ; and I can find no adjudged case that holds the innkeeper to this strict liability, except to his *guest*. The rule of liability is founded on a contract implied in law ; to *feed, lodge* and accommodate the guest for a suitable reward. (2 *Kent's Com.* 758.)

In all the other business relations of life, the law affects innkeepers, as it does all other persons. In regard to the goods of their *guests*, the law regards their liability as being different ; and the strictness of the rule in that respect is an exception. This extreme rule of liability was originally adopted from considerations of public policy, to protect travelers, not merely from negligence of innkeepers, but from the dishonest practices to which innkeepers at an early period often resorted through their servants, or other persons, in conspiring with them to rob and plunder their *guests* ; and which practice might still continue, but for this wholesome rigor of the law, so found necessary to insure the security of the guest. (*Mason v. Thompson*, (9 *Pick.* 284.) The rule is a wise and salutary one, even at this day. As it is necessary therefore, in order to entitle the plaintiff to recover, that Lyman Ingalsbee should have been the *guest* of the defendant, either actually or constructively — “*infra hospitium*” — when the loss happened, we will proceed to examine the question of what is necessary, in order to constitute one the *guest* of an innkeeper.

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I examine this first, as an original question ; because, upon consultation of legal authorities, I find the definition of a "*guest*" not uniformly the same. It has been much extended in its meaning in modern days ; first, into divisions of *actual* and *constructive* ; and then the constructive division has again been extended, until the entertainment of a *horse* in the stables and at the rack, has been held to be the *constructive* entertainment of its owner in the house and at the table ; or, in other words, the *animal*, horse, has been held to be sufficient symbol, to represent the original idea of *guest*, in his *human* master. Guest, in the ordinary acceptation of its meaning, and according to Webster, is, 1. "A stranger ; one who comes from a distance and takes lodgings at a place either for a night or for a longer time." And 2. "A visitor ; a stranger or friend, entertained in the house or at table of another, whether by invitation, or otherwise." One of the oldest legal definitions of a guest that I have found in the law books, is cited from Lord Holt, in *Parker v. Flint*, decided in 1698, (12 *Mod. R.* 255,) to wit : "If one comes to an inn and had made a previous contract for lodging for a set time, and does not *eat* or *drink* there, he is no guest, but a lodger ; and as such, is not under the innkeeper's protection ; but if he eats or drinks there, it is otherwise ; or, if he pays for his diet there, and does not take it there." The idea here is strongly put ; that though a man be an innkeeper, he is still permitted to make *special contracts*, like other persons, and if a special contract be made with him to lodge only, the innkeeper takes him not as a *general* guest, but as a *special* lodger, which he may do ; (*Parkhurst v. Foster*, 1 *Salk.* 387 ;) and in such case, he is liable to his lodger for his goods, in law, like any other *bailee*, but not as an *innkeeper*. The special contract for a limited purpose, does not bring the case within the policy of the law ; and he must depend upon the special or limited contract. (*Rol. Abr.* 3.) I think, therefore, we may safely say that the innkeeper who receives only property, of a person not his *guest*, according to the forego-



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ing definition for safe custody, even though such property be an animal to feed, and from whose keeping there may be some profit, is answerable only as an ordinary bailee. Though the fact of his being an *innkeeper* may perhaps throw the burthen of proof on him, to show the character of the bailment, and also that he exercised ordinary care. In this case it was admitted that the defendant was without fault. (5 Barb. 564. 5 Bl. R. 323.) The foundation of this strict rule of liability, against innkeepers, was for passengers and wayfaring men. *Calley's case* (reported in 8 Co. 32) is one of the oldest cases in the books of reports, and is cited with approbation in all the modern authorities. It was there held, "that to entitle the plaintiff to bring the action, he ought to be a passenger;" "that a neighbor shall not have the action." That case also holds out the idea that a *guest* of an inn is something more than the mere stopping of a neighbor for convenience. It seems to mean, "one who relies upon, or adopts the inn as his home for the time being," though the length of time which the guest remains, it seems, will not affect his right as such, provided he live there in the transitory character of a guest. (*Bac. Abr., Guest*, 5.)

The definition of an innkeeper shows that the same idea is the most prominent; that it must be a *person* to be entertained, to constitute a *guest*. Where, therefore, there is *no person* to be entertained, there is *no guest*. There is no difficulty, according to this definition, in showing that Lyman Ingalsbee was the guest of Mrs. Allen, his mother-in-law, at the time in question—an *actual* guest. Could he then, while an *actual* guest of one person, be the *constructive* guest of another, and upon this fiction of law be entitled to recover? Can one person be a *guest* at two different places at the same period of time? Had Mrs. Allen been an innkeeper also, would that fact have changed the defendant's liability, or the rule of law? I think not. "An innkeeper is a person whose business it is to entertain passengers and travelers, and provide lodgings and necessaries for them."

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(*Bac. Abr., Guest, B.*) The innkeeper may detain the *horse* of his *guest*. (*Cro. Car.* 271.) This carries the idea that the horse, and the guest, are distinct; the *one* does not represent the *other*. We have now seen what it is to be *actually* a guest of an innkeeper. "An *inn* is a house where the *traveler* is furnished with every thing that he has occasion for while on his way." (*Thompson v. Lacy*, 3 *Barn. & Ald.* 283, 6.) "It is a house kept open publicly for the lodging and entertainment of *travelers* generally, for a reasonable compensation." (*Hill. Elem. of Law*, 101. *Jac. L. Dic. title Inn.*) But we find, also, in the books, that a person may be *constructively* a guest, for the purpose of maintaining an action against the innkeeper, upon this technically rigid rule of liability. The difficulty that presents itself is, to fix definitely the reasonable line which determines the limits of the rule, of who may, and who may not, be a constructive guest. This should be an unvarying rule, based upon a principle of sound reason, with a certain limit, and not a sliding scale, which may be graduated by sympathy or prejudice, varying with, or yielding to, cases of peculiar hardship. We have already said, 1st. That the relation of innkeeper and guest, in all cases must exist, or the liability of the former as such, does not. (*Grinnell v. Cook*, 3 *Hill*, 489.) In the case last cited, nearly all the cases of this constructive relation were fully and ably reviewed by the supreme court; and, as I think, with the true conclusions. 2d. "That the right of lien always exists where the innkeeper was bound by law to receive the goods." At common law, innkeepers are bound to receive guests when required to do so, if not otherwise full; but this compulsion is not the law as to livery stable keepers, agisters, or of other employments, except common carriers. Therefore it is, that the law gives the lien, as compensation in degree, for this liability. The cases cited, which I regard as authority as to what persons are constructive guests, are consistent with this rule. In the case of *Sir Edwin Sands*, cited in *Gelly v.*

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*Clerk*, (*Cro. Jac.* 188.) “He came to an inn and lodged, went out thereof in the morning, left his cloak bag there, intending to return at night, and returned accordingly, and in the interim, his cloak bag was stolen; it was held he could recover.” He had been *actually* the guest; the relation had not ended; though actually absent, he was at law constructively the guest, when the theft was committed. So it was argued in the same case, “that if one comes to an inn and leaves his goods and horses, and goes into the town, and after return, and in the interim his goods are stolen, no doubt he is a guest.” I think the argument was sound. If he stopped at the inn, he made it his home; it was unnecessary he should have lodged or eaten; he was liable to pay for his room, his board and his horse keeping, and *this* liability in law is equivalent to having paid. Though actually absent, he was constructively a guest. The innkeeper was bound at law to receive and provide for him; and he had his lien on his goods for his bill; and whether the guest remained out, or stayed in, he had his rights at the inn, and upon the keeper; and the innkeeper had his corresponding rights to a lien, by reason of his being a guest.

The case of *Yorke v. Grenaugh*, which has an apparent bearing the other way, was reviewed by Bronson, J. in *Grinnell v. Cook*. The judges in that case differed. Powell and Gould against Holt; the former cited the case of *Robinson v. Walter*, reported in *Popham's Rep.* 127, as their authority. Bronson, J. examined this authority; upon which, as he says, the dictum of Powell and Gould decided that point; and he thinks they were not sustained by the case they relied on. The same case is reported in 1 *Salk.* 388, by a different title—“*York v. Grindstone*”—and which has been cited as additional authority, in this case. I have had access to *Bulstrode's Rep.* 269, where the case of *Robinson v. Walter* is also reported, and much more fully, from which it affirmatively appears, as Judge Bronson remarks, in *Grinnell v. Cook*, that the horse was brought to the inn by a stranger,

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who was a *guest* for some time, and departed, leaving the horse; the true owner afterwards hearing of his horse at the innkeeper's, demanded him, and it was held that, although the horse was left by one who was not the owner, and although the owner had never been a *guest*, yet, *as the law compelled the innkeeper to receive the stranger as a guest*, it was right that it should give him a *lien* on the horse, even as against the true owner. That case is therefore not authority for what it is cited to show.

Bennett

The principle of this rule is further illustrated in the case of *Bennett v. Mellor*, (5 Term Rep. 273.) The defendant in that case was an innkeeper, against whom the plaintiff brought his action for the value of the goods stolen out of the inn. The plaintiff's servant had taken the goods in question to the Manchester market, and being unable to dispose of them, asked leave at the inn to have the goods kept there till the next week. The answer given by the defendant's wife was, "that they were very full of parcels, and she could not tell." The plaintiff's servant then sat down in the inn, called for and drank some liquor, and put the goods on the floor behind him. When he got up, after sitting a while, the goods were missing. The plaintiff had a verdict. Buller, J. said: "The circumstances of this case distinguish it from that cited, where the innkeeper said his house was full, and refused to take the guest. That, if true, is a good excuse; if false, the innkeeper was liable to an action for refusing to take in a guest; but here the request was merely to take care of the plaintiff's goods until next week. If the defendant had taken the goods, upon this request, he would have been liable only as bailee, but that proposal was not accepted. Of course the case then stood as if no such offer had been made. The plaintiff's servant sat down, drank and became the guest of the house. Though a temporary guest, he was still a guest, and this was the ground of the decision. Gross, J. in the same case admits, in effect, that the innkeeper had a right to refuse to keep his goods without his

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person, but had no right to refuse *his person as a guest*; and not having objected to that, he became a *guest*, and the innkeeper became liable for the goods. In the case of *Binns v. Pigot*, (9 *Car. & Payne*, 208,) which was an action of trover, brought by the owner of a horse against an innkeeper, who claimed a lien upon him for his keeping, it did not appear distinctly how the horse came to the *innkeeper's* hands, but Parke, B. said: "An innkeeper has no lien upon an animal put into his stable, unless it be brought by a guest."

From these leading cases it appears to me, in this case, that Lyman Ingalsbee was in no sense of the term either the actual, or the constructive, guest of the defendant. Merely feeding his horse did not constitute its master a constructive guest. The only case, of American authority, that has been cited to prove him a constructive guest, is that in the court of Massachusetts, of *Mason v. Thompson*, (9 *Pick. R.* 280,) where it was held "that if a person commits his horse to an innkeeper to be fed, he is a guest," although he do not himself lodge or receive any refreshment at the inn. Wilde, J. in that case, it will be seen, bases his opinion upon the authority of *York v. Greenough*, (2 *Ld. Raym. R.* 866,) which we have shown by our examination, and the much more thorough and satisfactory review of Judge Bronson, is incorrectly reported in *Popham's Reports*; from which it is cited, but as it is reported in *Bulstrode* it is not in conflict, but entirely in harmony with the other English cases. And if it was really in conflict, Judge Bronson says "he should feel no disposition to follow it." *Mason v. Thompson*, therefore, stands alone; and stands, as I think, upon this point, without a ground of principle to support it. *Grinnell v. Cook*, (3 *Hill*, 485,) is a later and much better considered case in our own court, and entirely overturns *Mason v. Thompson*. Grinnell, in the latter case, was a tavern keeper, with whom one Tyler had put five horses to be taken care of. Cook, the defendant, was a deputy sheriff, and had levied on the horses on an execution against Tyler, the owner. Grinnell, the

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innkeeper, sued for taking away the horses, without paying his lien for their keeping. Tyler, the owner of the horses, had not lived at Grinnell's house at all; in other words, *had not been a guest*. The plaintiff was nonsuited. The court say: "Tyler, who owned the property, was not a traveler, nor was he in any sense a guest in the plaintiff's house, and I think it quite clear that the plaintiff was not bound to receive and take care of the horses." They affirmed the judgment of nonsuit.

The case we are considering, in its features, involves the same principles as *Grinnell v. Cook*. Lyman Ingalsbee in no sense of the term, actual or constructive, was the guest of the defendant. He made no proposition to become such guest, but he ate, drank, lodged and was provided for, at a different place. The length and breadth of his proposition to the innkeeper was, *to have his horse fed there*, probably because it was the most convenient place. The remark, "I am going to stay all night," must be construed according to his meaning; to which he at the time gave practical construction; and from the circumstances of his recent marriage, it was doubtless understood by the defendant's servant to mean that he was to stay with his wife, at his mother's-in-law, and not at the inn. The defendant was not bound in law to receive his horse, but did it; and he took as good care of this as he did of his own property. These privileges and responsibilities should be reciprocal between these parties—a duty, upon a right. He who does not become, and does not intend to become, a guest, is not entitled to the benefit of the rigid rule of law to which guests *only* are entitled. (*Fox v. McGregor*, 11 Barb. 41. 5 Sand. 242.) He was an ordinary bailee, and is only liable as such. The accident was without fault of the defendant. It was merely a special contract on his part to take care of the horse; his liability was like that of a livery stable keeper, a warehouseman, or an agister. He had not the innkeeper's lien, nor the innkeeper's liability. (*Edwards on Bailments*, 397.) The con-

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tract as understood between the parties was not with the defendant as *innkeeper*, on the one part, and a *guest* on the other. It was simply, on the one side, a neighbor, or the guest of a neighbor, who desired a night's stabling for a horse, and that only; and on the other side, an individual whose general business was innkeeping, consenting to receive a horse into his stable to be fed. I am satisfied that I was right in the opinion I gave on the trial, and I am for affirming the judgment.

ROSEKRANS, J. and JAMES, J. concurred.

Judgment affirmed.

[CLINTON GENERAL TERM, May 6, 1862. *Rosekrans, Potter, Bockes and James*, Justices.]

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SWEET and others, executors, &c. vs. IRISH.

On the 1st of May, 1834, T. loaned to I. \$1500, and took his bond under seal, with this condition: "The condition of this obligation is such, that the above sum of \$1500 is to remain without interest, in the hands of the above bounden I. until such time as the said T. shall demand payment of the said I.; then if the above sum is not paid, the above obligation to be of full force or virtue." *Held* that this was not a mere contract to pay on demand. That the words of the condition, taken together, imported something more than a declaration that the debt was due; and signified that the money was to remain in the hands of the obligor, and that he was to use it without interest, until called for. That a demand of payment was therefore necessary, before the statute of limitations would commence running.

And the obligee having died, without making any demand of payment, leaving a will, in which he gave and bequeathed to his daughter H., who was the wife of I., the obligor, the interest of the bond during her life; and if she should die before her husband, then the executors were directed to collect the \$1500, with the interest from the time of her decease; but in case she should survive I., then the executors were directed to collect the money from I.'s estate and pay her the interest thereof each year, and so much of the principal as her necessities should require; it was *further held* that this bequest suspended the payment, as well as the demand of payment, during

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the joint lives of I. and his wife. That so long as they lived, the principal sum was not due and payable, and the statute of limitations did not begin to run until the death of one of them, at which time the executors were directed to collect the money, and when, by a demand of payment, they could make the money payable.

That by accepting the money upon a contract wherein it was stipulated that there was to be no interest, and the principal payable only at the will of the obligee, the obligor put it into the power of the latter to postpone the day of payment to such time as suited his convenience and pleasure.

ON the 1st of May, 1834, David Tallman loaned to the defendant \$1500, and took his bond under seal, with this condition: "The condition of this obligation is such, that the above sum of \$1500 is to remain without interest in the hands of the above bounden Jonathan Irish, until such time as the said David Tallman shall demand payment of the said Irish; then if the above sum is not paid, then the above obligation to be of full force or virtue. Given under my hand and seal," &c.

JONATHAN IRISH. [L. S.]

David Tallman never demanded the money, in his lifetime. On the 29th of October, 1839, he made his last will and testament, containing the following clause: "4th. I give and bequeath to my daughter, Hannah Irish, the interest of a bond for fifteen hundred dollars, I hold against her said husband (defendant) during her natural life; and if she should die before her said husband, then I direct my executors to collect said sum, with interest from the time of her decease, to be hereinafter disposed of. But in case she should survive her said husband, then I direct them to collect it from her said husband's estate, and pay her the interest thereof yearly, and every year, and so much of the principal as her necessities may require."

The testator, Tallman, died in 1843, and the plaintiffs are his executors. After the testator's death, and in the lifetime of Hannah Irish the defendant's wife, the plaintiffs, as his executors, commenced an action in the supreme court, against the defendant Irish, upon the bond; and Justice Barculo, before whom the cause was heard at special term,



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decided that upon the true construction of the bond and will, the executors were not authorized to collect the former during the lives of the defendant and his wife. He accordingly directed a judgment to be rendered for the defendant, but neither party was to have costs against the other, nor was the judgment to be a bar to a subsequent suit after the death of either the defendant or his wife.

September 5th, 1860, the defendant's wife died, and the executors, in October thereafter, brought this action to recover the amount of the bond and interest from that date. To this the defendant pleaded the statute of limitations.

The action was tried at the circuit, before Justice EMOTT, without a jury. At the close of the testimony, the justice rendered a judgment for the plaintiffs for \$1663.54 with costs; and assigned the following reasons for such judgment:

"I am of opinion that this bond, being a continuing security, especially when construed with the aid of the will, cannot be considered as due until a demand of payment had been made. This would prevent the application of the statute of limitations.

In addition to this, the fair import and effect of the suit and judgment in the lifetime of the wife, to which the defendant was a party, was to estop him from setting up this defense in the present suit, or to permit this suit to be brought, notwithstanding the lapse of time.

On both these grounds the defense is overruled, and the plaintiffs must have judgment."

The defendant made a case and exceptions, and appealed to the general term.

*John Thompson*, for the appellant.

*J. F. Barnard*, for the plaintiffs.

*By the Court*, BROWN, J. The defense to the plaintiffs' action is the statute of limitations; and it becomes necessary to ascertain when the money upon the bond mentioned in

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the pleadings became due and payable; for then the statute began to run against the demand. In most if not all the aspects in which the question can arise, a promissory note payable on demand is due and payable presently. No demand is required in order to enable the holder to maintain an action upon it. And although a demand and notice of non-payment is required, to charge the indorser upon such a note, such demand and notice proceed upon the theory that the note is presently due; for it must be made within a reasonable time, and what is a reasonable time, depends upon the circumstances affecting each particular case. (*Sice v. Cunningham*, 1 Cowen, 397. *Haxtun v. Bishop*, 3 Wend. 15.) In the case of *Wenman v. The Mohawk Ins. Co.*, (13 Wend. 267,) it is said, "the demand is not parcel of the contract, but it is used to show that the debt is due. There are cases where the note is payable at a certain time, as one month after demand, in which it has been decided that the statute does not run until the time has elapsed after demand made. But in such cases it is obvious, from the terms of the contract, an actual demand was contemplated by the parties before the note became due." In the case of *Thorpe v. Coombe*, (8 Dow. & Ryl. 347,) the note was made payable two years after demand, and it was held that the statute did not begin to run until the two years after an actual demand had been made. The same rule obtained in *Thorpe and wife v. Booth*, (*Ryan & Moody*, 388,) where the note was made payable twenty-four months after demand. The question would therefore seem to resolve itself into one of intention, to be gathered from the written contract, from an examination of which the courts are to determine whether the parties to the note, or other written obligation, intended the money should be payable presently or at a future time.

The bond upon which this action is brought was made and dated on the 1st day of May, 1834, by the defendant, Jonathan Irish, to the plaintiffs' testator, David Tallman, in the penal sum of \$1500, with the condition thereunder written

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in the following words: "The condition of the above obligation is such, that the above sum of \$1500 is to remain without interest in the hands of the above bounden Jonathan Irish until such time as the said David Tallman shall demand payment of the said Irish. Then if the above sum is not paid, then the above obligation to be in full force or virtue." This is not a mere contract to pay on demand. The words of the condition, taken together, import something more than a declaration that the debt is due. The words, "that the above sum of \$1500 is to remain without interest in the hands of the above bounden Jonathan Irish until such time as the said David Tallman shall demand payment," signify that the money was to remain in the hands of the obligor, and that he was to use it without interest until called for. Otherwise the words "without interest" would be without sense and meaning; for the law is well established, as a general rule, that notes and written obligations payable on demand, draw no interest until after the time of demand made or suit brought, which is deemed equivalent to a demand of payment. (*Chitty on Bills*, 10th ed. 681.) The money was to remain in the hands of the obligor without interest until demand of payment, and thus the demand became a material stipulation of the contract.

David Tallman died in 1843, having made no demand of payment of the money mentioned in the bond. He left a last will and testament, which was duly proved and letters thereon were issued to the plaintiffs. In this will he gives and bequeathes to his daughter Hannah, who was the wife of the obligor and defendant Jonathan Irish, "the interest of the bond for \$1500 I hold against her husband during her natural life; and if she should die before her husband, then I direct my executors to collect said sum, with the interest from the time of her decease, to be hereinafter disposed of. But in case she should survive her said husband, then I direct them to collect it from her husband's estate and pay her the interest thereof yearly and every year, and so much of the

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principal as her necessities require." The bequest of the interest to the wife, in 1843, was in effect a bequest to the husband during their joint lives ; for unless the equity courts should interpose for the protection of the wife, he was legally entitled to collect the interest and to apply it to his own use ; in short, to deal with it as his own. As debtor, it was his duty to pay, and as the husband of the legatee he could receive, and so nothing was to be paid. The effect of the will—which was received in evidence upon the trial under the defendant's exception—is material upon the question of the statute of limitations. Because, assuming that I am right in thinking the money was not due until after an actual demand of payment, then the bequest of the will suspended the payment, as well as the demand of payment, during the joint lives of Jonathan Irish and Hannah his wife. So long as they lived, the principal sum was not due and payable, and the statute did not begin to run until the death of one of them, at which time the executors were directed to collect the money. By accepting the money upon a contract wherein it was stipulated there was to be no interest, and the principal payable only at the will of the obligee, the obligor put it into the power of the latter to postpone the day of payment to such time as suited his convenience and pleasure. This right he has chosen to exercise in his will, and has therein named the day of the death of either the obligor or his wife Hannah as the time when the executors might make the money payable and due by a demand of payment. Hannah, the wife of the defendant, died on the 5th of September, 1860, sometime before the commencement of this action.

The view which I have taken of the contract disposes of the only question involved in the case. There is, however, an additional piece of evidence, received also under the defendant's objection and subject to his exception, to which I will briefly refer. It is an abstract of the record of a judgment in this court between the parties to this action, wherein the same bond is the cause of action, it having been pros-

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ecuted to recover the money mentioned in the condition thereof. The pleadings are not made a part of the evidence, and we only know what was the defense set up in the answer by inference. The judgment was rendered by the late Mr. Justice Barculo, and he determines that the executors were not authorized to collect the money mentioned in the condition of the bond "during the lives of the defendant and his wife. If the wife should invoke the aid of the court to secure her the interest, it might be proper to interfere; but as long as she is satisfied with things as they are, the plaintiffs cannot collect the principal. Judgment must be rendered for the defendant; but neither party is to have costs against the other. Nor is this judgment to be a bar to a subsequent suit after the death of either the defendant or his wife." This record was intended by the plaintiffs to show that the collection of the money had been stayed by the judgment, and on that account the statute of limitations did not run against the plaintiffs' claim. The defendant objected to the evidence, for the reason that it was irrelevant, and that the time when the money became due and payable must be determined by the language of the bond itself. If I am right in the construction I have put upon the instrument the judgment was not material to the plaintiffs' case, and its introduction as evidence did not prejudice the defendant.

The judgment should be affirmed.

[DUTCHESS GENERAL TERM, May 12, 1862. *Emott, Brown, Scrugham and Lott, Justices.*]

W. T. MILLS *vs.* D. S. MILLS and Wm. DOLSEN.

An agreement to convey land to another, upon the consideration that the latter shall give all the aid in his power, spend his time, and use his utmost influence and exertions, to procure the passage of a law pending before the legislature conferring upon the covenantor a valuable public franchise, is illegal and void, as being against public policy.

THIS action was brought to enforce the specific performance of a contract for the conveyance of thirty-four city lots of land in Brooklyn. The agreement recited that the plaintiff had been licensed by the city of Williamsburgh to lay a rail track for the running of cars on Division avenue, and that a bill was pending before the legislature to authorize the defendant Mills to lay a like track on the same avenue. It then stipulated that, in consideration of the agreement of the defendant Mills to discontinue a slander suit he was prosecuting against the plaintiff, and convey the land in question to the plaintiff, he (the plaintiff) would cause his said license from the city of Williamsburgh, and the good will of Ivans & Mills in an omnibus line on the same avenue, to be assigned to the defendant Mills; and also "will give all the aid in his power, spend such reasonable time as may be necessary, and generally *use his utmost influence and exertions to procure the passage to a law*" of the before mentioned bill as amended, granting authority to the plaintiff and the defendant Mills to construct such road; and also will, so far as reasonably necessary, assist and aid, to the extent of his ability, in procuring for the defendant Mills "a license from the city of Brooklyn for the construction of such rail road, and the running of cars on said Division avenue, or so much thereof as lies within the control of the said city." There are mutual stipulations that neither party will co-operate in the introduction of a bill for the construction of a rail road on said avenue, "*or in any way give aid or countenance to any such measure.*" The defendant Mills stipulates to convey, "when the said bill heretofore intro-

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duced in the senate as aforesaid, with the amendment or amendments above referred to, or some like bill, shall become a law." The complaint did not allege that any such bill became a law; and the statute book (1853) shows the contrary. The action was referred to a referee, to hear and determine; who dismissed the complaint, on the ground that the contract was illegal. Judgment was entered in favor of the defendant, for costs, and adjudging the agreement void; and the plaintiff appealed.

*C. C. Egan*, for the appellant. I. The contract is legal and valid. Its purpose is lawful, and its consideration legal and sufficient. (*Sedgwick v. Stanton*, 14 *N. Y. Rep.* 289.) The consideration of the agreement was: The withdrawal of the plaintiff's petition from the legislature; the use of his influence and exertions to procure the passage of a bill theretofore introduced in the legislature; the assignment to the defendant Mills of all the right, title and interest of Ivins & Mills under any certificate filed under the provisions of the general rail road act; the assignment to the defendant Mills of the license granted by the common council of Williamsburgh; the assignment to the defendant Mills of the good will of the stage line of Ivins & Mills; the assignment to the defendant Mills of all the right of the plaintiff accruing to him under the act when passed; the continued running of the stage line for fifteen months at a great loss; the discontinuance of the slander suit, with costs. The agreement by the plaintiff to "give all the aid in his power, and generally use his utmost influence and exertions to procure the passage to a law" of the act referred to, is to be construed to mean as it was intended, and as it is expressed, that he will use such influence and exertions in a *legal* and *proper* manner; and there is nothing in this case to show that any other than a legal and proper use was made. (*Sedgwick v. Stanton*, *supra*.) The influence which the plaintiff was to use, was not individual or private. It was

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not so intended by the contract, is not so expressed or intimated therein, and there is no *proof* of any such. In the cases of *Harris v. Roof's Ex'rs*, (10 Barb. 489,) and *Rose v. Truax*, (21 *id.* 361,) there was *proof* that the services sought to be recovered for were lobby services and personal solicitation of individual members, following them to their rooms, &c. In the case of *Gray v. Hook*, (4 N. Y. Rep. 449,) the agreement was upon the withdrawal by the plaintiff of an application for an appointment to office, where the plaintiff and the defendant were the only applicants, in favor of the defendant, to divide the fees of such office.

II. The referee should have allowed the plaintiff to go into proof to show the nature and character of the services contemplated by the contract and actually performed under it, by the plaintiff. Without proof of any kind on the question, the referee was not warranted in assuming an evil intent from words innocent in themselves, and adjudging the contract illegal and void upon its face.

III. But the defendants cannot object to the consideration. If the parties have clothed the title with possession, as they have in this case, or have otherwise acted on it as an existing ownership, they are held to have perfected the agreement in equity, and even if the terms rest in parol, a conveyance may be decreed. (*Adams' Eq.* 86.) If the contract is executed, a consideration is immaterial. (*Adams' Eq.* 79, *marg. paging.* *Reed v. Long*, 4 *Yerger*, 68.)

IV. The referee should have rendered judgment for the plaintiff, on the demurrer of the defendants. The judgment entered herein should be reversed with costs.

V. The execution, acknowledgment and deposit of the deed by the defendant Mills and wife, and the recitals contained in the deed, operated as an estoppel, running with the land and converting it to an interest which the court will adjudge accordingly. It binds parties and privies in blood and estate and in law. Ejectment could be maintained upon the mere estoppel. (1 *Greenl. Ev.* 9th ed. §§ 22, 24, *note.*)



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*J. M. Van Cott*, for the respondent. I. The agreement is against public policy, and is void. (1.) It is a *log-rolling* agreement, first, to defeat a measure then pending before the legislature; second, to combine to obtain the passage of another act granting a rail road franchise to the contracting parties; third, to combine to procure a like grant from the municipal legislature of Brooklyn; fourth, to combine against any like legislative grant to any other party or parties. Combinations for such private purposes are contrary to the common duties of citizenship, and corrupting and dangerous in their tendency. (2.) It is a contract for legislative jobbing and corruption, "to use his utmost influence to procure the passage of a law." Worcester's dictionary defines the verb thus: "To act upon with directing or impulsive power; to guide or lead; to modify; to actuate; to sway." This, then, according to the popular sense of "influence," is an agreement to impel, guide, lead, actuate or sway the legislature to reject a pending bill, and to pass another bill granting a franchise to the contracting parties. (3.) The word "influence" has acquired a precise legal signification. A citizen, acting on public motives, may exert himself for or against particular legislative or executive action; but a contract (based on motives of private gain and stipulating for a compensation) to "influence" such legislative or executive action is corrupt, and is void, *per se*. By its terms, the plaintiff would have disentitled himself to all benefit under the contract, and lost an estate if, as a citizen, he had signed a petition in favor of the grant of the interdicted franchise to any other person or persons. (a.) A contract, in consideration of a sum of money, to "influence" a judge to render a favorable decision, would be manifestly illegal. (b.) A contract, for a like consideration, to "influence" a witness to give favorable testimony, would be palpably void. (c.) A contract to compensate for "influence" to induce the executive to pardon a convict, or appoint to an office, or to veto a legislative measure, would fall under the same legal condem-

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nation. Much more, in all these cases, would the contract be illegal, if the reward were made contingent on successful exertion of the "influence." (d.) Contracts *not* to oppose an insolvent's discharge, are corrupt and illegal. (e.) Contracts *not* to compete at auction sales, are illegal. (4.) The plaintiff, not being a member of the legislature, could not act upon it, and "procure" the passage of a law by his "influence," otherwise than by personally soliciting and influencing, or engaging others personally to solicit and influence, the individual members of the legislature, out of legislative session. Persons "cannot with propriety be employed to exert their personal influence with individual members, or to labor in any form privately with such members, out of the legislative halls." (*Per Selden, J.*, 4 Kern. 294.) (5.) The principle invoked has been applied in a great number and variety of cases. (*Marshall v. Bal. and Ohio R. R. Co.*, 16 How. U. S. R. 314. *Gray v. Hook*, 4 Comst. 449. *Devlin v. Brady*, 32 Barb. 518. *Satterlee v. Jones*, 3 Duer, 116, 17. *Davison v. Seymour*, 1 Bosw. 92. *Bell v. Leggett*, 3 Seld. 176. 2 Kent's Com. marg. 466, 7, and notes. *Broom's Max. marg.* 573, 583. *Bartle v. Coleman*, 4 Peters, 188. *Harris v. Roof's Ex'rs*, 10 Barb. 489. *Rose v. Truax*, 21 id. 361. *Sedgwick v. Stanton*, 4 Kern. 289. *Wall v. Charlick*, 8 N. Y. Leg. Obs. 230. *Eddy v. Capron*, 4 R. I. Rep. 394. *Cunningham v. Cunningham*, 18 B. Monroe, 19. *Barton v. Port J. Plank Road Co.*, 17 Barb. 397. *Coppock v. Bower*, 4 Mees. & Welsb. 361. MS., *Dingeldim v. Third Av. R. R. Co.* *Pingry v. Washborne*, 1 Aiken, 264. *Phillim. on Jur.* 66. 2 Poth. on Oblig. p. 2, app. by Evans.)

II. Even if the contract is not void at law, it is such a one as a court of equity will not lend its aid specifically to execute. Several of its provisions are not enforceable against either party specifically, or in damages; and if the contract is not enforceable in its entirety, it must entirely fail. (*Vaux-*

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*hall Bridge Co. v. Spencer*, 2 *Madd.* 356. *Josephs v. Pebrer*, 3 *Barn. & Cres.* 639.)

*By the Court*, BROWN, J. By the agreement of the 8th June, 1853, referred to in the pleadings in this action, the defendant David S. Mills covenanted to convey to the plaintiff, by deed with full covenants, certain lots of land, thirty-four in number, situate upon Myrtle avenue and Witherspoon street in the city of Brooklyn. The deed of conveyance was to be executed by himself and wife and delivered when the bill, which before that time had been introduced into the senate of the state of New York, with the amendments, or some similar bill, to which I shall presently refer, should become a law. The agreement recited that a bill had recently been introduced into the senate of the state granting to David S. Mills and others a franchise for a rail road on Division avenue, in the county of Kings, and for the operating of trains of cars thereon. The considerations for the grant and conveyance of the 34 lots of ground were : 1st. The transfer and assignment to David S. Mills of the right, title and interest of the firm of Ivins & Mills in and to a certificate or declaration filed by them under the general rail road act, together with the license theretofore made to them by the common council of the city of Williamsburgh, and also the good will of an omnibus line of Ivins & Mills on Division avenue. 2d. A covenant by William T. Mills " that he would give all the aid in his power, and spend such reasonable time as may be necessary, and generally use his utmost influence and exertions to procure the passage into a law of the said bill heretofore introduced into the senate of the state of New York, as hereinbefore mentioned, or any other bill to the same end ; the said bill being so amended as to limit the grant therein mentioned to the said parties hereto, without any other party in interest in such grant except them ; and also to be amended as may mutually be agreed between said parties, from time to time, until the same shall become a law. And fur-

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ther, when any such bill shall become a law, said party of the first part will release, assign and transfer to the party of the second part, by a good and sufficient instrument in writing under his hand and seal, all the right, title and interest which shall accrue to or belong to him, the party of the first part, under such law." 3d. A further covenant by William T. Mills, "that he will not in any way co-operate or conspire with any other person whomsoever at the introduction into either branch of the legislature, or elsewhere, of any proposition for the construction of any rail road whatever on Division avenue, in the county of Kings, or in any way give aid or countenance to any such measure." The purpose of the plaintiff's action was to obtain a specific performance of the contract, and to compel David S. Mills to execute and deliver the deed for the 34 lots of ground in the city of Brooklyn. William Dolson was made a party upon the allegation and charge that the lots had been conveyed to and were then held by him without consideration, and with full knowledge of the plaintiff's equitable rights thereto. The defendants put the principal allegations of the complaint at issue by their answers, and the action was referred to Henry Nicoll, Esquire, to hear and determine. Upon the hearing before the referee, the counsel for the plaintiff read the pleadings, and also read in evidence the agreement executed under the hands and seals of William T. Mills and David S. Mills. The counsel for the defendants then moved that the complaint be dismissed, which motion the referee granted, upon the ground that the agreement was illegal and void. Judgment having been entered, upon the report, the plaintiff appealed.

I have quoted the covenants at large from the agreement for the purpose of seeing the precise nature of the plaintiff's obligation under the contract, and what were the nature of the services which he was to render as an equivalent for the 34 lots of ground. He was to give all the aid in his power, spend his time and use his utmost influence and exertions, to procure the passage of a law conferring a valuable public fran-

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chise upon another. These are his very words. The state owed to the proposed grantee no duty, no debt and no obligation which it did not owe to all the rest of its citizens, and it withheld no property or estate from him to which he had any manner of right. It might, however, grant the franchise, and should grant it, if thereby the public interest would be served, and not otherwise. The plaintiff was not therefore employed, as he lawfully might be, to prosecute a private claim, nor as he also might have been, without the breach of any moral duty, to collect information, prepare statements and furnish arguments freely and openly to a legislative committee in favor of any public measure which might incidentally benefit individuals. His employment went far beyond this. He was to give all the aid in his power, spend his time and use his utmost influence and exertions, to procure for the defendant from the legislature that which, if granted at all, should have resulted from a sober examination and sincere conviction of its public necessity and utility, and not from the exertions and influence of hired and mercenary outsiders. The kind of influence to be used and applied to move the minds of the lawgivers to think favorably of the proposed rail road franchise in Division avenue, is not defined and described in the contract. But we know well enough what it is. We know that similar grants have been the cause of great scandal and reproach to the legislation of the state, and that the influences employed to procure their passage, by persons like the plaintiff, who are not intrusted with seats in the legislature, have tended to corrupt the public morals, weaken the sense of public duty, impair the public virtue, and lessen the hope and confidence which men have hitherto had in the perpetuity of representative government. "All contracts or agreements which have for their object any thing which is repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void. The principle is universally recognized, and

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has often been applied in our own courts to contracts which had for their object the perversion of the ordinary operations of the government; such as contracts to prevent a fair competition at legal sales by auction; contracts to prevent the administration of the insolvent laws; and contracts by which one person engages to pay another for his aid and influence, even in procuring an appointment to office. (*Bell v. Leggett*, 3 *Comst.* 176.) So, also, the same principle has been applied to a contract to obtain signatures to a pardon. To procure the passage of an act of the legislature by using personal influence, and an agreement to pay a sum of money for withdrawing opposition to an act touching the interests of a corporation, are equally offensive and repugnant to public morality. It will not be useful to pursue the subject further, or to quote authorities in support of what has been said. They are numerous, and I could add nothing to the argument or to the force and power of expression with which some of the cases condemn all contracts of the kind. Some of the considerations mentioned in the agreement are doubtless unexceptionable, and, standing alone, would support the covenants of the defendant. But where the contract grows out of or is connected with an illegal act, the court will not lend its aid to enforce it.

The judgment should be affirmed.

[DUTCHESS GENERAL TERM, May 12, 1862. *Emott, Brown, Scrugham and Lott*, Justices.]

TABOR *vs.* ROBINSON.35-483  
Oct. 1862

Shelves, drawers and counter-tables, put up by the owner to fit the building for the uses of a retail dry goods and grocery store, and without which the building is not adapted to the business, are, as between vendor and purchaser, fixtures, and a part of the freehold, and the vendor has no right to remove them.

Upon an agreement for the sale of land, where the payment of the purchase money and the delivery of the deed are concurrent acts to be done at a future time, the purchaser has an equitable interest in the land, and a right to a specific performance of the agreement by the execution and delivery of the deed at the time appointed, upon his paying the purchase money. But he is not the owner of the property purchased, until the happening of those events.

Until he has performed the contract, on his part, he is not vested with the right of property, and cannot assert the legal rights, or claim the legal remedies, which belong to those who own the title.

For a removal of the fixtures, occurring between the execution of the agreement and the time appointed for the payment of the purchase money and the delivery of the deed and of the possession of the land, the purchaser cannot maintain an action against the vendor.

A demand of the fixtures, from the vendor, and a refusal to deliver them, made prior to the time fixed for completing the agreement and delivering the possession, will not avail the purchaser, or remove the impediment in the way of his maintaining an action.

**A**PPEAL from a judgment of the county court of Dutchess county, rendered in an action commenced before a justice of the peace. The plaintiff recovered a judgment, before the justice, which was reversed by the county court.

*J. F. Barnard*, for the plaintiff.

*E. Crummev*, for the respondent.

*By the Court*, BROWN, J. The articles claimed to have been fixtures, and a part of the realty, consisted of the shelves, drawers and counter-tables in a building used as a country store, in the town of Dover, Dutchess county. They were in the building and in actual use at the time of the contract to purchase made between George Tabor and George Robin-

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son, the parties to this action. The question is between vendor and vendee, and is to be determined by the rules which prevail and apply between persons in that relation. The shelves and drawers (the witnesses said) were put in after the usual way. There were stancils—which I take to have been standards or supports—fastened to the wall, and the shelves shoved into them. They were put up and used for a dry goods and grocery store. There were four or five counter-tables; one of them 13 feet 9 inches long by 2 or 3 feet wide; tacked to the floor to make them stay there. They were put up, the witness said, to stay there. Another witness said the tables were nailed by putting a nail through the leg. Another said they were nailed, and had a cleet nailed down by the side of the legs, and they had been moved about the store a number of times.

✓ The qualities of a fixture are that it must be essential to the business of the erection, and attached to it in some way, or mechanically fitted so as, in ordinary understanding, to make a part of the building itself. It must be permanently attached, or the component part of some erection, structure or machine which is attached to the freehold, and without which the erection, structure or machine would be imperfect and incomplete. Physical annexation is not indispensable. Ponderous articles may be annexed by force of their own weight, and many others might be enumerated which are really portable and movable, and are moved about from time to time, and which are nevertheless a part of the freehold. For example, rail fences upon a farm, the keys and padlocks upon buildings, parts of the machinery of mills of various kinds, &c. These are carried about from place to place, but they are essential and indispensable parts of the machinery or structure, or of the farm, and necessary to its use and enjoyment. As between vendor and purchaser they are fixtures. The shelves, drawers and counter-tables, in the present case, were put up by the owner to fit the building for the uses of a retail dry goods and grocery store. Without



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them the building was not adapted to the business. They were made to fit the building which the defendant contracted to sell, and not to fit any other building. And when he removed them, the shelves, certainly, and the drawers and counter-tables, probably, were little better than so much lumber. They were for these reasons fixtures, and a part of the freehold; and the defendant did wrong to remove them. The purchaser had every reason to think he would receive them with his deed. If this was the only issue in the case, I should not hesitate to say that the judgment in the justice's court was properly rendered.

X We encounter a more serious objection to the judgment, in the right of the plaintiff to maintain this action; which I will now proceed to consider. He says, in his complaint, that on the 11th of November, 1856, he bought from the defendant a lot of land, with two dwelling houses and all other buildings upon it, upon which there was a store with the fixtures, in Dover, &c. That after the sale, and on the 12th March, 1857, the defendant entered upon the premises and tore out all the fixtures belonging thereto, and took them away and converted them to his own use. This complaint asserts that the plaintiff was the owner and had the legal title to the premises upon which the entry was made, and from which the fixtures were taken, at the time of the defendant's wrongful entry. If true, the right to recover would be indisputable. The answer put the title in issue by a direct denial. The proof showed a written contract made on the 11th November, 1856, between the plaintiff and the defendant, by which the latter agreed to sell the lot of ground with the dwelling houses in question, for \$3400, to be paid and secured to be paid on the 1st day of May thereafter, at which time the deed, with full covenants, was to be delivered. The payments were \$1200 in cash and a bond and mortgage upon the premises sold, for the residue, with the interest. Possession was to be given to the purchaser on the first of April, 1857. The fixtures were removed on the 12th March,

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1857, before the deed was given, or the payment of the purchase money, and while the defendant was in the possession of the property. The proof does not show, affirmatively, that any deed has been given; but there is proof that the plaintiff paid the purchase money and possession was given him on the first of April, according to the terms of the agreement of sale. I therefore infer that the deed was delivered for the premises at the time appointed in the contract for that purpose. It will be observed that the payment of the purchase money and the delivery of the deed were concurrent acts, to be done at one and the same time. George Tabor's right to have the deed, on the first of May, 1857, was very clear, under the contract; but not unless he was prepared to pay and did pay the purchase money at that time. He had an equitable interest in the lands and a right to a specific performance of the contract by the execution and delivery of the deed at the time appointed, but there must also be performance and payment on his part at the same time. He was not the owner of the property purchased, until the happening of these events. The contract might or might not be performed; but until it was performed on his part, he was not vested with the right of property, and could not assert the legal rights, or claim the legal remedies, which belong to those who own the title. He was entitled to the usual remedies of those having equitable interests, to prevent waste and injury and alienation to others until the time appointed to execute the contract, but that was all. The injury of which he complains was committed before he obtained the deed, and before he was entitled to it. If his action is treated as an action of trespass, for a tortious entry upon lands, possession of the *locus in quo* is a material element in such an action, because the injury is done to the possession. If it be treated as an action of trover and conversion of personal property, which seems to be the frame of the complaint, the same element is wanting; for the plaintiff in such an action must, at the time of the conversion, have had a property in

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the goods, either general or special, and have had also the possession or the right to the immediate possession. (1 *Chit. Plead.* 150, and the notes.)

The demand made of the defendant to deliver over the fixtures to the plaintiff, in March, 1859, does not remove the impediment in the way of the plaintiff's maintaining the action. The demand and refusal is evidence of the conversion, but of nothing more. The conversion is not disputed. The question is upon the plaintiff's right of property. If the executory contract had the effect to pass the title to the real property, then the fixtures removed were the property of the plaintiff at the time they were removed; otherwise not. He purchased the realty, and that passed by force of the deed, and not by force of the executory contract. The moment the shelves, drawers and counters were severed from the freehold they ceased to be a part of it, and could not pass by a conveyance which was strictly a grant of the land and its appurtenances. To make the demand and refusal of any value, or available for any purpose, the plaintiff must have had the right of property, and thus have been entitled to the possession. And he cannot be deemed to have had the right of property unless the executory contract had the effect to pass to and vest in him the legal title.

The cases of *Strong v. Taylor*, (2 *Hill*, 326,) and *Tuthill v. Wheeler*, (6 *Barb.* 362,) are authorities to show that a mere executory contract for the sale of a canal boat, when the purchase money is paid, the purchaser to have the immediate possession, to be paid for at a future time from the freights earned by the boat, does not vest the title in the purchaser until the whole of the consideration money is paid. In the first named case the property was seized by the sheriff upon an execution against the party who contracted to purchase, and in the latter named case the vessel was seized by the tax collector upon a tax warrant against the party contracting to sell. And in both cases portions of the purchase

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money had been paid, and the parties contracting to purchase had the actual possession at the time of the levy and seizure.

What the plaintiff's remedy is, if he has any, and whether he has waived it by accepting the deed without objection, it is not necessary for us to say. We think the present action cannot be maintained, and the judgment of the county court should be affirmed.

[DUTCHESS GENERAL TERM, May 12, 1862. *Emott, Brown, Scrugham and Lott*, Justices.]

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DOUGHTY and others, Commissioners of Highways of the town of Beekman, vs. BRILL.

There can be no proceedings by commissioners of highways, for an encroachment upon a highway, in a case where the highway has not been *laid out* and recorded, in conformity with the directions of a highway act.

The fact that a road has been *used* as a public highway for twenty years or more, will not give the commissioners jurisdiction to proceed against an individual, for an encroachment thereon by fences, unless such road has been laid out and recorded as a public highway.

THE defendant is the owner of a farm in the town of Beekman, Dutchess county, bounded on a public highway in said town, and within the last two years had moved his fence out in said highway, and taken and appropriated a large quantity of the same to his own use. The appellants, as commissioners of highways of said town, took the legal steps and declared the said fence an encroachment, and ordered the same to be removed. The defendant denied the encroachment. A jury was then called, who found the fence an encroachment, and made the proper order, which was filed. The highway has been used as a public highway for over 40 years. The respondent refused and declined, after such order, to remove the said fence, and this action was then brought to recover the penalty given by the statute. The defendant sets up as a defense that the highway in question, not having

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59h	49
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been surveyed and a record thereof filed, was not a highway "laid out" within the meaning of the statute. The judge before whom the action was tried, at the circuit, held with the defendant, and ordered judgment of nonsuit. This appeal was brought to reverse said judgment.

*John Thompson*, for the appellants. I. The statute provides, that "all public highways now in use, heretofore laid out and allowed by any law of this state, of which a record shall have been made in the office of the clerk of the county or town; and all roads not recorded, which have been or shall have been used, as public highways, for twenty years or more, shall be deemed public highways, but may be altered in conformity to the provisions of this title." (1 *R. S.* 4th ed. p. 1049, § 115.) "In every case where a highway shall have been laid out, and the same has been or shall be encroached upon by fences, erected by any occupant of the land through or by which such highway runs, the commissioners of highways of the town shall, if in their opinion it be deemed necessary, order such fences to be removed, so that such highway may be of the breadth originally intended." (*Id.* 1050, § 121.) The only question presented is, what is the meaning of the term "laid out," as used in section 121? We claim that it includes *all highways*, whether opened by a jury and commissioners, or made so by user for 20 years. The statute has declared that a road used by the public for 20 years and upwards, is a public highway. How a road or highway becomes a highway is a matter of indifference: the thing to be considered is, is it a highway? Statutes are to be construed beneficially—the public are to be protected. The object of this section 121 is to empower the commissioners to remove encroachments, and it is their duty to see that the public have their rights. The highway in question is a highway, so declared by statute; and the public have the same right to have this highway of the width that it was originally fenced and "intended" and the width that it has

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been used for the last 40 years, that they have to have a highway found by a jury of the width it was laid out. This being a highway by statute, is subject to all the laws relating to highways. Any other construction given to this section 121 would be destructive to the public interest. If the term "laid out" is to be construed only as applicable to roads laid out by a jury, then one half of all the old roads in this country—we venture to say that this proportion has never been recorded—are liable to be encroached upon and their usefulness destroyed; for if they can be encroached upon one foot, they can be twenty feet, and up to the point, leaving just enough space for a wagon to pass along. This is not answered by saying that the commissioners should have the roads recorded; for all this encroachment may be done before a record is made. Besides, if this term "laid out" is to receive the narrow construction contended for, then it will not apply to a road used 20 years and upwards and recorded; for there has been no "laying out" here; the commissioners make a record. They do not lay it out, and we thus have two classes of highways unprotected by this section 121. If roads used 20 years and upwards and recorded, are within the term "laid out," then the road in question is; for the same reason that would include the one, will the other. The record of a road in no way enlarges or alters the right of the public or the boundaries of the road, but only perpetuates the evidence of a public right. (24 *Wend.* 492.) The marginal note in the case of *The People v. Lawson*, (17 *John.* 277,) that "a road used as a common highway since the year 1777, but not recorded as such, is not a public highway within the meaning of the act relative to highways, (session 36, chapter 33,)" is not sustained by the opinion in the case. The court puts its opinion expressly on the ground that the jury had found that "it had not been used as a public highway for 20 years next preceding the 21st of March, 1797."

II. The second objection raised in the answer is, that the road in question has no definite limits. The supreme court

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has settled this point to the effect that the boundaries of a road claimed by user for 20 years, are as it has been used for the past 20 years. (6 Cowen, 189. 24 Wend. 492.)

III. The answer raises another objection, that the first order of removal made by the commissioners and served on the defendant, is defective. If there is any thing in this objection, it is now too late to raise it. If the defendant intended to rely upon this point, he ought to have done so at the time, by treating it as a nullity; instead of which, he waived all defects; served a notice denying the encroachment; compelled the commissioners to call a jury, who decided that he had made the encroachment complained of, &c., and this suit is now brought to recover the penalty for not removing the fence. (*Angell on Highways*, § 232.)

*J. F. Barnard*, for the defendant. I. The words of the statute give a penalty only when "a highway shall have been laid out." (1 R. S. 4th ed. p. 1050.) The ascertaining, declaring and recording an old road, is not "laying out" a road. (*The People v. Judges of Cortland Co.*, 24 Wend. 491.)

II. The notice is insufficient; it does not specify the width originally intended. (*Mott v. Com'rs of Rush*, 2 Hill, 472.)

III. The order required the defendant to remove his fence, which was behind the old rail fence removed by him, and the order is entire.

*By the Court*, BROWN, J. The plaintiffs brought their action to recover certain penalties, alleged to have been incurred under the highway act, for the negligent omission to remove an encroachment by fences erected upon a highway in the town of Beekman. The answer admitted most of the allegations in the complaint; especially the meeting of the commissioners and the order that the encroachments be removed, and the service of the notice to remove; but it denied that the notice, or the order, specified the breadth of the road originally intended. It also admitted the service of the

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notice denying the encroachment, the issuing of the summons, the service thereof, the meeting of the freeholders, the proceedings had before them, their certificate finding that an encroachment had been made, and the filing the same with the town clerk as required by the statute. But it alleged and insisted that such road or highway had never been laid out, and that no record or survey of the laying out of such road had ever been filed in the clerk's office of the town of Beekman.

At the trial before Mr. Justice EMOTT, at the Dutchess circuit, it was admitted by the counsel for the plaintiffs that there was no record of the highway in controversy in the office of the town clerk of Beekman; in other words, that it was not one of that class of highways which had been laid out by proceedings under the statute, and it also appeared that the order of the commissioners, and the notice for the removal of the encroachment, did not specify the breadth of the road as originally intended. This latter circumstance ensued as a consequence of the want of a record in the town clerk's office. The plaintiffs were nonsuited upon the trial, the judge being of opinion that there could be no proceedings for an encroachment, by the commissioners, in a case where the highway had not been laid out, and recorded, in conformity with the directions of the highway act.

The distinction between public highways laid out and allowed by law, and public highways which become such by a user of twenty years and upwards, is recognized and maintained in various provisions of title 1, chap. 16, in regard to highways and bridges. Thus, in the 3d subdivision of section 1, it is made the duty of the commissioners of highways to cause such of the roads used as highways as shall have been laid out and not sufficiently described, and such as shall have been used for twenty years but not recorded, to be ascertained, described and entered of record in the town clerk's office. So also section 104 declares, "all public highways now in use, heretofore laid out and allowed by any law of this



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state, of which a record shall have been made in the office of the clerk of the county or town; and all roads not recorded, which have been used as public highways for twenty years or more, shall be deemed public highways, but may be altered in conformity to the provisions of the title." The first class become public highways by force and authority of proceedings had under the statute, and which assure compensation to the owners of the lands taken for that purpose; while the latter class become such by force of a rule of the common law, which presumes a dedication or grant from the public use for twenty years and more. The distinction is substantial and material. It was present to the minds of those who framed the law; and we, who are to construe and expound its various parts, must also keep it in mind. Otherwise we shall not give effect to the intention of the legislature.

The 107th section of the act, which is the basis of the plaintiffs' proceedings in this action, declares that "in every case where a highway shall have been laid out, and the same shall have been encroached upon by fences erected by any occupant of the land through or by which such highway runs, the commissioners of highways of the town shall, if in their opinion deemed necessary, order such fences to be removed, so that the highway may be of the breadth originally intended." The commissioners are to make and sign an order in writing. They are also to give notice in writing to the occupant of the land; to remove the fence within 60 days; and every such notice and order shall specify the breadth of the road originally intended, the extent of the encroachment and the place or places where the same are. Then follow the sections containing the directions for summoning a jury, for the hearing, the rendering their verdict and filing their certificate, if the encroachment is denied by the occupant of the adjoining land. It is to be observed, that the proceedings are had in respect to "a highway which shall have been laid out, and shall have been encroached upon by fences erected by an occupant of adjoining land. Indeed, they can apply to

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no other. The commissioners are to order the fences to be removed, so that the highway may be of the breadth originally intended. They are also to specify in the order and notice what the breadth of the road was originally intended to be, and the extent and the place of encroachment. That is, the order and the notice are to contain the lines—the exterior lines of the road—as originally laid out, and inform the occupant upon what part of the line he has encroached by fences. In *Mott v. The Commissioners of Highways of Rush*, (2 Hill, 472,) the court held it to be an incurable defect, in similar proceedings, that the notice and order omitted to specify the original breadth of the road, and the extent and the places of the encroachment. In the opinion it is said: “The commissioners are required to put the party in possession of all the particulars of the encroachment necessary to enable him to go upon the ground, where it is alleged to exist, and remove it at once. They are to ascertain the original width of the road, the place and extent of the encroachment, and must specify and limit the same in a way that can be easily and readily comprehended by the occupant.” When the statute speaks of the “breadth of the road originally intended,” it uses terms which can only apply to roads deliberately and carefully laid out, with lines designated by monuments, or courses and distances, and the width of which is accurately stated and made a record in the office of the town clerk. Roads which become public highways by twenty years’ use do not always originate in the intention of any one. In a country like ours, in times past, they have their origin not unfrequently in accident and convenience, in obscure paths and passage ways from one settlement to another, which increasing population and travel in time matures into a public highway. They certainly do not usually have their origin in that intention which manifests itself in a formal written grant or dedication wherein the lines and courses, length and breadth, are designated with accuracy and precision, for the information of future times. In regard to such roads, there

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is no means at the command of the commissioners by which they can say what the breadth was originally intended to be. As to them, the provisions of the statute in regard to encroachments could not be executed. This construction accords with the letter of the statute.

I therefore conclude that the commissioners of the town of Beekman had no jurisdiction of the subject of the encroachment upon the road referred to in the pleadings, and that they were properly nonsuited at the trial.

The judgment should be affirmed.

DUTCHESS GENERAL TERM, May 12, 1862. *Emott, Brown, Scrugham and Lott, Justices.*]

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 SCHMEIDER vs. McLANE and DUFOUR.

Rules 15 and 28 of the general rules made by the Metropolitan Police Board, for the government of the police, which direct that all persons who shall be arrested any time when the police courts are not open shall be conveyed immediately to the police station house of the policeman who makes the arrest; and that when a person accused of having committed a *felony* or *misdemeanor* is brought to the station house when the police courts are not open, the officer on duty, after ascertaining that the act charged constitutes a felony or other offense for which a person can lawfully be detained, &c. shall cause the accused to be detained in the station house until the next morning, will not justify the imprisonment in the cell of a station house, of a person who is charged with no offense, other than the breach of a municipal ordinance against riding horses on the sidewalks.

Where a person is arrested in the day time, in the city of Brooklyn, for violating a city ordinance, it is the duty of the officer to take him before the police justice, or one of the justices elected under the act to establish courts of civil and criminal jurisdiction in that city, passed March 24, 1849.

There is a wide difference between the perpetration of a crime, and the violation of a corporation ordinance. *Per BROWN, J.*

The 28th of the general rules of the Metropolitan Police Board directing the officer on duty to ascertain that the act charged constitutes a felony or other *offense* must be construed to mean a *criminal* offense, and nothing less. *Per BROWN, J.*

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Schneider v. McLane

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**A**PPEAL from a judgment of the city court of Brooklyn, entered upon the verdict of a jury.

*P. V. R. Stanton*, for the defendants.

*J. W. Gilbert*, for the plaintiff.

*By the Court*, BROWN, J. The plaintiff is the principal of a private school in the city of Brooklyn, and was arrested by one Jeremiah Clark, a policeman of the city, without process, for riding his horse on the sidewalk on Ninth street, between 3d and 4th avenues, in the presence and view of the officer, and in violation of one of the ordinances adopted by the common council of the city. The arrest was made at 5½ o'clock in the afternoon of the 21st of February, 1861. The defendant Benjamin B. McLane is the captain and the defendant John Dufour the sergeant of the metropolitan police force, 8th precinct, in the city of Brooklyn. The plaintiff, immediately upon his arrest, was taken to the station house of the 8th precinct, by officer Clark, and at 6 o'clock in the afternoon delivered to the defendants, who received him into their custody, examined and searched him, and took from his person such money as he had and put him in a cell, where he was confined until the next morning; at which time he was taken before the police magistrate. He there paid the fine imposed by the ordinance, had his money restored to him and was discharged. His horse, which had been put into the pound and kept during the night, was also restored to him upon his paying the pound keeper the sum of fifty cents. He thereupon commenced his action against the defendants, for the wrong done to his person, alleging the detention and imprisonment by the defendants to have been oppressive and unjustifiable, and without the authority of law. The defendants in their answer set up the breach of the city ordinance, in presence and view of the officer, the plaintiff's arrest therefor and commitment to them for safe

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keeping, and their right as officers and members of the metropolitan police force to detain him for hearing before the police magistrate. The jury found a verdict for the plaintiff for \$100, upon which judgment was entered, and from which the defendants duly appealed upon exceptions taken to the charge of the city judge to the jury; which I will proceed to examine.

The city ordinance was produced and proved, and its violation by the plaintiff in presence and view of the officer was not controverted. It also appeared, from the evidence of James H. Cornwall, who was the police magistrate at the time, that the usual hours during which the police courts were open for the transaction of business at the city hall, were from 9 o'clock A. M. to 4 o'clock P. M., during each day. That the witness then resided within the city, at No. 101 Clermont avenue, and Justice Blatchley, another magistrate, resided one mile and a half nearer the 8th precinct station house than the witness. The witness also said he was then in the habit of transacting business at the different station houses. The defendants also read in evidence certain general rules made by the Metropolitan Police Board, for the government of the police, rule 15 of which directs that "all persons who shall be arrested during the time the police courts are directed to be kept open, shall be taken immediately to the police court in the police district to which the policeman who may make the arrest may be attached; and all persons arrested at any other time shall be conveyed in like manner to the police station house of the policeman who may make the arrest." Rule 28 also directs, that "when a person accused of having committed a felony or misdemeanor is brought to the station house when the police courts are not open, the officer on duty to whom the complaint is made, is only to ascertain from the person preferring it that the act charged constitutes a felony or other offense for which a person can lawfully be detained, and that there is reasonable ground for the complaint against the party ac-

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cused. He will then enter the name of the prisoner on the blotter, and cause him to be detained in the station house until the next morning. He will also enter the name and address of the complainant and witnesses on the blotter, and take the necessary measures to insure their appearance before the magistrate in the morning." It was under the authority of these regulations that the defendants sought to justify the imprisonment of the plaintiff. When the evidence was closed, the judge instructed the jury that the imprisonment was without legal authority, and the only question for them to determine was the amount of the damages the plaintiff should recover for the detention. To this charge and instruction the defendants' counsel excepted. He also asked the judge to charge that it was a question of fact for them to determine, whether or not the hour at which the plaintiff was brought to the station house was a reasonable one to have taken him before a magistrate. This the judge refused to do, but instructed them it was a question of law and not of fact, as to the reasonableness of the hour, (there being no dispute that it was 6 o'clock in the afternoon.) And, as matter of law, he instructed them that 6 o'clock P. M. was a reasonable hour at which to have taken the plaintiff before a magistrate. To which refusal and charge the counsel for the defendants excepted.

The power of the board of metropolitan police to make the regulations referred to was not questioned, upon the argument. The authority given to the members of the police to arrest persons in the act of committing crimes, or accused, upon reasonable and probable cause, of committing crimes, and their detention until an examination can be had before the committing magistrate, is indispensable to the due execution of the criminal law and the protection of the community. The power, however, should be carefully and discreetly exercised, and not extended to acts reprehensible, and which may subject the offender to some measure of punishment, but which are not criminal. There is a wide difference between

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the perpetration of a crime and the violation of a corporation ordinance. The former implies moral turpitude, and is presumed to be committed *malo animo*; while the latter involves no moral guilt, and may have been inadvertently, nay innocently, committed. The omission to remove the snow and ice from the sidewalks of a populous city may be as much a violation of a corporation ordinance, to which a penalty is attached, as to ride a horse upon the sidewalks of the same city. Neither of them are crimes, and no one conversant with the nature and principles of the criminal law would regard, or think to punish, them as crimes. The distinction between public crimes and private injuries is created by positive law and referable only to civil institutions. "A crime or misdemeanor is an act committed or omitted in violation of the public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms, though in common usage the word crimes is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of misdemeanors only." (4 *Black. Com.* 5.) To subject a person, without trial or examination, to search and examination of his person, and to confinement during the night in the cell of a station house, who is charged with no offense but the breach of a municipal ordinance in regard to the mode of passing over the public streets, would be a needless piece of severity, if not of actual barbarity, and one which I do not think it was the intention of the legislature or the board of metropolitan police to inflict. The 28th of the general rules already referred to speaks of persons accused of having committed a felony, or misdemeanor, brought to the station house when the police courts are not open. And although the same sentence directs the officer on duty to ascertain that the act charged constitutes a felony or other offense, the latter word must be construed to mean a criminal offense, and nothing less; because the obvious purpose of the

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rule is to prescribe the duty of the police officers in their treatment of persons charged with crimes. The term crime, or offense, when used in any statute, shall be construed to mean any offense for which any criminal punishment may by law be inflicted. (2 *R. S. 2d ed.* 587, § 33.) And so the doing of an act which is prohibited by statute, to which there is a penalty attached, is not a misdemeanor. There are offenses against morality, against the laws of health, against good breeding and the order and decorum of social intercourse, &c., but when the law speaks of offenses, it means those of which the law takes cognizance, and for which criminal punishment may be inflicted. We are not left, however, to conjecture or construction as to the duty of the members of the police who may arrest persons thought to have committed a breach of a corporation ordinance, and to have incurred a penalty therefor. The common council of the city of Brooklyn derive their power to make and establish ordinances and by-laws, by virtue of the act to consolidate the cities of Brooklyn and Williamsburgh and the town of Bushwick, passed April 17, 1854. The 20th section of title 6 of the act prescribes the mode of enforcing such ordinances, and declares that any person arrested in pursuance of the act, for the violation of any ordinance, by-law or regulation of the common council, or of the board of health, may be taken before the police justice, or either of the justices elected under the act to establish courts of civil and criminal jurisdiction in the city of Brooklyn, passed March 24, 1849, who shall thereupon have authority to impose upon such person a fine not exceeding the penalty prescribed by the ordinance which such person shall be proved to have violated, and to commit such person to the county jail of Kings county for a period not exceeding thirty days, or until such fine shall be paid. In the present case the plaintiff was arrested in open daylight, at half past five o'clock in the afternoon. It was the duty of the arresting officer to have taken him before a magistrate, in compliance with the plain directions of the act. He was



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delivered over to the defendants at 6 o'clock on the same day. They had no power to receive or to detain him. They were mistaken in respect to the extent of their authority, and so their defense of justification failed upon the trial. The city judge was right in saying to the jury that the only question for their determination was the amount of the plaintiff's damages.

The judgment should be affirmed.

[DUTCHESS GENERAL TERM, May 12, 1862. *Emott, Brown, Scrugham and Lott*, Justices.]

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 WARNER and LOOP vs. BLAKEMAN and others.

A regular foreclosure by advertisement under the statute, of a mortgage which has in fact been paid before foreclosure, but not satisfied of record, and the sale made in pursuance thereof to a *bona fide* purchaser, is equivalent to a sale under a decree in equity; and is an entire bar of all claim of any person having a lien by judgment subsequent to the mortgage, who shall have been duly served with notice of sale.

The mortgagor and his assigns may impeach such a sale by showing that the proper statutory proceedings have not been taken to render the foreclosure effectual; but they cannot, after being served with notice of sale, go further and show that the mortgage was fraudulently foreclosed after having been paid, and thereby defeat the title of a subsequent *bona fide* purchaser of the mortgaged premises.

The cases of *Wood v. Colvin*, (2 *Hill*, 258,) and *Cameron v. Erwin*, (5 *id.* 272,) commented upon and explained, and some of the dicta of Judge Cowen, in the latter case, overruled.

Intermediate judgment creditors, although served with notice of sale, may, within six years after discovery of the fraud, come into a court of equity to set it aside; but the court, in setting it aside, will protect subsequent purchasers who, without notice of the fraud, have advanced their money upon the faith of a regular statutory foreclosure of the mortgage.

Where the mortgagee, in possession of the mortgaged premises, purchases in the premises, and as part of the consideration of such purchase cancels the mortgage debt, he is entitled to protection as against judgment creditors, who become such after the execution of the mortgage.

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**Warner v. Blakeman.**

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The delivery up of the bond and mortgage, to the mortgagor, in such a case, to be canceled, does not deprive the mortgagee of his prior lien upon the premises to the full extent of the mortgage debt.

**T**HIS action was commenced on the 28th day of November, 1859, by the above named plaintiffs, against the defendants, to set aside two mortgages and the foreclosure of one of them, and subsequent conveyances and contracts for the sale of parts of said mortgaged premises, on the ground that the said first two mortgages had been fully paid and satisfied prior to said foreclosure, and that said foreclosure and sale of the premises were fraudulent and void as to the plaintiffs, they being judgment creditors of the mortgagor.

The pleadings are sufficiently stated in the opinion of the court.

On or about the 3d day of April, 1848, Robert Turner and wife, and Samuel C. Turner and wife, executed a mortgage to Eben Blakeman to secure the sum of \$1200 and interest, upon a certain woolen factory, dwelling house and lot, situate at Munnsville, Madison county, acknowledged the same day, and recorded in Madison county clerk's office, 6th April, 1848.

The referee then finds that Robert Turner, being in possession as owner on the 30th of April, 1852, executed and delivered to Hiram Whedon a mortgage on this same property for \$3000, payable on the face of it in one year with interest. Whedon at the same time signed and delivered to Turner a separate instrument in writing, specifying that the mortgage was given to secure Whedon for Turner's indebtedness to him, and for indorsing a bank note, and for further contemplated indebtedness by Turner to him for goods to be sold, and for Whedon's agreeing to indorse sundry other notes for Turner; and that when Turner should pay such obligations and demands, saving Whedon from all harm or loss, then the mortgage was to be returned to Turner.

This stipulation was never recorded.

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On the 1st day of April, 1853, Turner and Whedon had a settlement, in which Whedon's account against Turner was found to be \$1246.08, and Turner's credit was found to be \$103.87, leaving a balance, for which Turner gave his note, of \$1143.21, and leaving also a balance on last settlement unpaid of \$432.26, making in all the sum of \$1575.47.

On the 10th day of March, 1853, Warner and Loop, the plaintiffs in this action, obtained a judgment for \$1326.76 against Robert Turner and Sandford Turner, the roll being filed in the city and county of New York, and a transcript duly filed and docketed in Madison county clerk's office on the 14th day of March, 1853. Soon after, an execution was issued and delivered to the sheriff of Madison county, but no property could be found by the sheriff, and nothing was ever collected on the execution, which was lost, and now remains unsatisfied, and the whole amount of the judgment is still due the plaintiffs. In December, 1853, or January, 1854, the factory was destroyed by fire, still leaving the aforesaid incumbrance upon it.

On the 17th day of February, 1854, Robert Turner had become still further indebted to Whedon, in about the sum of \$900, and having lost his factory by fire, had become insolvent, and so much embarrassed in his business that he contemplated making an assignment, if he could not obtain pecuniary aid, and in order to relieve him, the following arrangements were on that day made between him and Whedon and Eben Blakeman, viz: Blakeman sold Turner a farm of 70 acres, then owned by him in Cazenovia, at the sum of \$4300, subject to a mortgage on it of \$800. This farm, in the same arrangement, was sold by Turner to Whedon for the same sum, Whedon taking the conveyance directly from Blakeman, subject to the \$800 mortgage, and undertaking to account with Turner for the \$4300. At the same time Whedon pur-

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chased of Turner one fourth of a new factory built on other lands, but not finished, at . . . . . \$2,125 00

The net value of the farm sold by Turner as stated, is . . . . . 4,300 00

Property transferred or sold by Turner to Whedon, towards satisfying Turner's debts to Whedon, \$6,425 00

On this arrangement of February 17, 1854, conveying the farm, Whedon was to pay Blakeman for Turner \$1000. Whedon had advanced to and had become liable for Turner, . . . . . \$7,511 36

From which deduct price of farm and one quarter of factory as above, . . . . . 6,425 00

Leaving a balance still in Whedon's favor of . \$1,086 37 and which was found on subsequent settlement, made April 1st, 1854, to have increased to \$1154.27.

In the arrangement of February 17, 1854, this \$3000 mortgage was not canceled, but Whedon was to take the personal responsibility of Turner for the balance then left due him, and the mortgage was then, at the request of Turner and Blakeman, assigned by Whedon to Blakeman.

This assignment was by a writing indorsed on the back of it, expressing a consideration therefor of \$1000. Blakeman was to pay this consideration of the assignment to Turner in pine lumber owned by him in Lewis county. Nothing was paid by Blakeman to Whedon on this assignment, nor was any part of Turner's liability or indebtedness to Whedon assigned to Blakeman.

At the time of this arrangement between Turner, Whedon and Blakeman, on the 17th of February, 1854, the farm was counted to Turner, from Blakeman, at . . . \$4,300 00 Turner was indebted to Blakeman, as shown by a

settlement made a few days after—Feb. 26, '54, 1,370 11

\$5,670 11

Warner v. Blakeman.

Blakeman bought of Turner one	
quarter of the factory at . . .	\$1,875 00
Whedon was to pay Blakeman for	
Turner, . . . . .	1,000 00
Blakeman had an assignment of	
insurance money, . . . . .	2,138 00
There were several indorsements on	
the \$1200 mortgage, which it	
was agreed should apply towards	
the farm, amounting in the ag-	
gregate to . . . . .	740 00
Leaving the full face of the \$1200 mortgage	
due as by this agreement, . . . . .	5,653 00
And leaving a balance to be adjusted between	
them of . . . . .	\$17 11

When this transaction of February 17, 1854, was consummated, it was considered and understood by the parties that Turner owed Blakeman on the \$1200 mortgage—

Of principal, . . . . .	\$1,200 00
Interest on ditto to April 19, 1854, six years and	
sixteen days, . . . . .	527 67
On the \$3000 mortgage to be paid in lumber, .	1,000 00

The defendant Blakeman produced the following receipts:

“This certifies, that Robert Turner has applied all the money which he did pay to Eben Blakeman to apply on his mortgages, and likewise the money which said Blakeman received of the Madison Co. Insurance Company as payment towards the farm which said Blakeman sold to said Turner, which will leave the mortgage all clear from any indorsement, and all due to Eben Blakeman or his heirs or assigns.

Stockbridge, March 1st, 1854.                      ROBERT TURNER.”

“Rec’d of Eben Blakeman the full amount of insurance

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which he received of the Madison County Insurance Company for me. Stockbridge, July 26th, 1854.

ROBERT TURNER."

The referee also finds, that in November, 1854, Robert Turner and wife executed and delivered to Eben Blakeman a warranty deed of the premises covered by these mortgages, expressing a consideration received of \$2000.

The following exhibits were also produced:

"Deed from Robert Turner and wife to Eben Blakeman, dated November 18th, 1854. Consideration expressed in deed, \$2000. The following is a part of said deed, in words and figures: 'The above premises are conveyed subject to a mortgage executed to Eben Blakeman, April 3d, 1848, principal \$1200 dollars; also to a mortgage executed to Hiram Whedon, April 30th, 1853, of \$3000.' The said deed contains a clause of warranty as follows: That the said parties of the first part will 'warrant and defend against any person claiming under them;' the words, 'against any person whomsoever lawfully claiming the same, or any part thereof,' having been erased before execution.

The said deed was acknowledged the 18th day of November, 1854, and was recorded November 20th, 1854, and covers the dwelling house and lot and factory site, also covered by the \$3000 and \$1200 mortgages."

"Affidavits of foreclosure sale, recorded May 15, 1855. Sale made 17th March, 1855. Publication commenced 16th December, 1854, and terminating 10th March, 1855."

"Mortgage for \$3000, from Robert Turner and wife to Hiram Whedon, executed 30th April, 1852, acknowledged 13th May, 1852. Assigned to Eben Blakeman 17th February, 1854; consideration expressed in assignment, \$1000; assignment acknowledged 27th November, 1854, before Shubael Keyes, justice.

For and in consideration of the sum of \$1000, to me in hand paid by ———, of Stockbridge, Madison county, the

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receipt whereof is hereby confessed, have bargained, sold and assigned to said ———, all my right, title, claims and interest to and in the within mortgage. EBEN BLAKEMAN."

The above assignment erased by black ink lines drawn across it, and the name of "Eben Blakeman" at the bottom also erased when exhibited.

The referee then finds as follows :

In the fall of 1854, Blakeman delivered this \$3000 mortgage to Robert Turner, with an assignment executed by him and indorsed on the back of it with a blank left for the name of the assignee, for the purpose of enabling Turner to use it as his own in obtaining a loan of money, or in securing debts owing by him, and Turner endeavored to use it for that purpose but without success; and the \$1200 mortgage and the bond accompanying the same was at the same time delivered by Blakeman to Turner for a like purpose. After these mortgages were delivered to Turner and in his hands, Blakeman, in seeking to obtain a title to the premises, obtained from Robert Turner and wife the deed before mentioned, which was executed and delivered to Blakeman on the 18th day of November, 1854, and received by Blakeman on condition that it would give him a good title, and he carried it to the clerk's office of Madison county and had it recorded on the 20th day of November, 1854, the premises being worth at that time \$1200, and no more.

After his return from the clerk's office, Blakeman was reminded of the existence of the Warner and Loop judgment, and having received a redelivery of the two mortgages from Turner, leaving the bond given with the \$1200 mortgage in his hands, procured an acknowledgment, on the 27th day of November, 1854, from Whedon, of the assignment to him, and had it and the mortgage recorded in the clerk's office of Madison county on the 28th of November, 1854.

Having done this, Blakeman then proceeded to foreclose the \$3000 mortgage by advertisement under the statute, claiming as due thereon \$2626.25, and on the 17th day of

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March, 1855, sold, and himself became the purchaser of, the premises on such foreclosure sale for the sum of \$800, and then entered into possession and claimed to have obtained a valid title under such sale. A copy of the advertisement or notice of mortgage sale was duly served on Warner and Loop, the plaintiffs in this action.

At the time of the foreclosure of the \$3000 mortgage by Blakeman, the plaintiffs in this action had no knowledge of the existence of the writing or agreement made by Whedon in connection with that mortgage and delivered to Turner, showing what that mortgage was given for; nor had they any knowledge of the facts or previous dealings between Whedon and Turner tending to show that the full consideration had been furnished by Whedon and repaid by Turner, or that said mortgage was discharged, or was any other than a valid subsisting lien upon the premises covered by it. And it was not until within six years prior to the commencement of this action, that they became possessed of any such knowledge.

On the 11th of February, 1856, Eben Blakeman and wife conveyed by warranty deed to the defendant Daniel P. Price that portion of said premises, as alleged and described in the plaintiffs' complaint in this action; and on the 12th of February, 1856, they also conveyed to the defendant Richard Brooks that portion of said premises as alleged and described in the said complaint; and that said Blakeman, before the commencement of this action, sold by contract to the defendants James Bright and Andrew Wylie that portion of said premises, as described and set forth in said complaint; and that said defendants Price, Brooks, Bright and Wylie entered into and are now in possession of said premises so purchased by them respectively, as stated in the plaintiffs' complaint.

The following are the conclusions of law, as found and reported by the referee: 1. That the \$3000 mortgage executed by Robert Turner and wife to Hiram Whedon, on the 30th day of April, 1852, was in its inception a valid instru-



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ment, and constituted a lien upon the premises therein described, for the security of Turner's existing indebtedness to Whedon, and for such further indebtedness as should accrue by reason of advances or credits on Whedon's part to Turner, and such liabilities as Whedon should thereafter assume to pay as indorser or surety for Turner, to an amount in the aggregate not exceeding \$3000. (Exception.)

2. The plaintiffs in this action having no knowledge, at the time of the foreclosure of the \$3000 mortgage, of the facts tending to invalidate or show that the lien of these mortgages had ceased, are not precluded by reason of notice of such mortgage sale, from afterwards seeking equitable relief in this action. (Exception.)

3. If these mortgages, or either of them, were a valid or subsisting lien on the premises, at the time of giving the deed to Blakeman by Turner and wife, of the equity of redemption in the premises, such deed having been received on the express condition of its securing a good title, was not a merger of these mortgages thereon.

4. That Whedon having, previous to the assignment of the \$3000 mortgage to Blakeman, sold to Turner property, and advanced to him money, and become liable to pay, and subsequently did pay, as surety for Turner, a sum in the aggregate much larger than the amount for which the mortgage was given, and Turner having at or previous to such assignment sold to Whedon property towards the liquidation thereof to a much larger amount than the sum for which the mortgage was given, although still leaving a considerable balance due Whedon, yet the mortgage thereby became *functus officio*, and the lien created thereby ceased and became extinct as against the plaintiffs in this action, they having become judgment creditors, whose liens had intervened. (Exception.)

5. This \$3000 mortgage having been given to secure Whedon for his debts against, and personal liabilities as security for, Turner, and Turner having reduced such liabilities so far

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that Whedon gave up the mortgage and assigned it for the use of Turner, and instead thereof took Turner's personal responsibility for the balance in his favor, was a fulfillment of its design, and it could not be held by Blakeman as against judgment creditors with intervening equities, to perform another office by securing an entirely different contract or debt, although the parties might have supposed it would have that effect. (Exception.)

6. If the \$3000 mortgage was a valid subsisting lien for any amount after the assignment from Whedon to Blakeman, such lien had been reduced to \$1000, the amount which constituted the consideration for the assignment thereof, and this amount being subsequently so far liquidated by the transactions and state of deal between Turner and Blakeman that Blakeman delivered up the mortgage to Turner, to be used by him as his own in raising money or securing his debts, was a relinquishment of all remaining lien, if any, and a surrender of the security. (Exception.)

7. The \$1200 mortgage having been reduced \$750 by payment actually made thereon, its lien to that extent was thereby reduced, and could not again be restored by the parties, so as to operate to the prejudice of other liens which had attached.

*And the subsequent surrender of the mortgage by Blakeman to Turner, to be used by him as his own in raising money or in securing debts, and the bond accompanying the same still being held by Turner, opens a door through which the intervening judgment creditors enter with a paramount lien ; and the former lien of the \$3000 mortgage having been spent while in the hands of Whedon, and then turned over or assigned to Blakeman for Turner's use, and having been surrendered to Turner by Blakeman, to be for a third time used or negotiated by Turner, no longer constitutes a lien, and the power of sale being extinguished, the foreclosure and sale of the property covered by it was a nullity, and conferred no title on the purchaser ; and the conveyance*

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*from Blakeman and wife to the defendants Price and Brooks conferred on them no title, nor can they give a title to Bright and Wylie. (Exception.)*

8. The referee found and directed "that the plaintiffs in this action have judgment therein; and that as to said plaintiffs all proceedings in the aforesaid foreclosure of said \$3000 mortgage and the sale of the premises thereon to Eben Blakeman, and all subsequent conveyances by him made to others, defendants in this action, or either of them, and all title derived under such mortgage foreclosure sale, be set aside, and adjudged and declared null and void; and that both the said \$3000 mortgage and the said \$1200 mortgage be adjudged and declared satisfied and canceled, and that the plaintiffs recover their costs and disbursements in this action. (Exception.)

The defendants requested the referee to find as a conclusion of law as follows: That Price and Brooks having purchased portions of the premises covered by the said \$3000 mortgage from Blakeman and wife in good faith and without having any knowledge or notice of any of the facts or circumstances invalidating said \$3000 mortgage, or the sale under it, or said Blakeman's conveyance as against the plaintiffs, the conveyance of said Blakeman and wife to them is valid and legal, and transferred the title to them in their respective portions of said premises, and being innocent purchasers in good faith, they ought not to be charged with any costs or expenses of said action.

The referee refused to find as requested, and the defendants excepted.

*W. H. Kinney, F. Kernan and H. T. Jenkins, for the appellants.*

*N. Foote, for the respondents.*

*By the Court, MORGAN, J.* The plaintiffs are judgment creditors of Sanford Turner and Robert Turner, and the

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defendant Blakeman went into possession of certain lands which he purchased of Robert Turner, upon which the judgment was a lien, and which probably once belonged to Robert and Sandford, although the case does not in express terms so find.

It would appear from the pleadings and evidence, as well as the findings of fact by the referee, that Blakeman, before the commencement of this suit, conveyed or contracted away the premises in question, in different parcels, to Daniel P. Price, to Richard Brooks, and to James Bright and Andrew Wylie, who are in possession and are made parties defendants.

The premises consist of what was once a valuable factory and site; but the factory was burned down, and the value of lands is estimated at the present time at only \$1200. Blakeman went into possession under a warranty deed from Robert Turner and wife, November 18, 1854, expressed to be for the consideration of \$2000; but he took the conveyance subject to a mortgage executed to Eben Blakeman, April 3, 1848, (by Robert and Sandford Turner,) principal, \$1200; also to a mortgage executed (by Robert Turner) to Hiram Whedon, April 30, 1853, of \$3000, covering the same premises.

On the 17th February, 1854, this \$3000 mortgage was formally assigned by Whedon to Blakeman, expressed to be in consideration of \$1000; and on the 16th day of December, 1854, he commenced a foreclosure of it by advertisement under the statute, claiming that there was due thereon and unpaid the sum of \$2626.25; and on the 17th day of March, 1855, the premises were bid in by Blakeman for \$800. Notices of this foreclosure were duly served upon the plaintiffs. One object of the complaint is to set aside this sale and cancel the mortgage, on the ground that it was satisfied before foreclosure, and that the foreclosure was a fraud upon the judgment creditors of Robert Turner. It is also claimed in the complaint that the \$1200 mortgage has been paid and satisfied, and the complaint also seeks to cancel that. The

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complaint also seeks to set aside the conveyances and contracts of Blakeman to the defendants Price, Brooks, and Bright and Wylie. Price purchased half an acre for \$800, and received a warranty deed from Blakeman and wife, February 11, 1856. It would appear that he paid down \$150, and to secure the balance executed back a mortgage for \$650. How much remained unpaid at the time of the commencement of this suit does not appear. And on the 12th day of February, 1856, Blakeman conveyed to Richard Brooks by warranty deed half an acre of the premises for the consideration of \$300. It would appear that he paid Blakeman \$50 down, at the time, and to secure the balance gave his mortgage to Blakeman for \$250. And it is stated in the complaint that Blakeman, after the foreclosure of the \$3000 mortgage, sold the residue of the premises to James Bright and Andrew Wylie, by a written contract of sale. The price is not stated, although it is stated that a portion of the consideration remains unpaid. It further appears that they went into possession under the contract of sale, and will be entitled to a deed on payment of the balance of the purchase price.

These defendants all join in the answer, and attempt to sustain the statute foreclosure of the \$3000 mortgage, although Bright and Wylie deny that they are entitled to a deed. (Probably they have one.) Price, Brooks, Bright and Wylie admit that they purchased separate parcels of said premises from Blakeman and wife, as set forth in the complaint, but aver that they made such purchase in good faith and for sufficient consideration, and that Blakeman conveyed to each of them a complete and perfect title to said premises.

It is not alleged in the complaint, nor is it found by the referee, that they had notice of the facts which are relied upon to avoid the statute foreclosure of the \$3000 mortgage. The referee, however, ordered judgment for the plaintiffs, directing these conveyances to be set aside, and they are adjudged and decreed to be null and void. The judgment also

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sets aside the \$3000 mortgage and the \$1200 mortgage, and all the proceedings upon the statute foreclosure, but does not interfere with the deed from Robert Turner to Blakeman, of November 18, 1854.

Without doubt, the facts found by the referee fully justified the conclusion that, as to creditors having a lien on the premises, the \$3000 mortgage was *functus officio*, and that its subsequent foreclosure by Blakeman was a fraud upon creditors who had intermediate liens.

And as the plaintiffs have no knowledge of the facts which rendered it inoperative at the time of the statute foreclosure, they are not concluded by it, but may, at any time within six years after the discovery of the fraud, institute a suit to set aside the sale. But the necessity which they are under to come into a court of equity to set aside the sale, presupposes that the sale is valid until it is set aside. (21 How. U. S. Rep. 497, *Catron, J.*)

There is no defect in the chain of title as it appears upon the record. But outside of the record, it appears that the mortgage, which was foreclosed, was subject to a condition which rendered it inoperative as against judgment creditors and subsequent purchasers without notice.

The parties to the mortgage cannot complain, as they consented that it might be held as security for Turner's indebtedness to Blakeman. They would be estopped from complaining of the foreclosure, if they had assented to it, with a knowledge of all the circumstances.

The referee, however, must have decided that subsequent purchasers *in good faith* could not claim protection under such a foreclosure, but that they stood in the shoes of Blakeman and must abide by his title; not, however, because the defect in his title was matter of record, for it was not, but because the mortgage was *defunct* as a security when the sale took place.

In my opinion, the proposition of the learned referee cannot be sustained. There was at least an apparent authority

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for the foreclosure and sale. The mortgage was kept on foot by the parties to it, so that as to them, subsequent purchasers would have acquired a good title.

By the foreclosure in this case, the plaintiffs' lien upon the equity of redemption was cut off at law so far as the record spoke; and there is no reason why this court should disturb a subsequent *bona fide* purchaser, because it is made to appear that the claim, secured by the mortgage, was in fact satisfied before the foreclosure.

A subsequent purchaser has at least as strong a claim upon the equity of the court as the judgment creditor has by his general lien. The lien of the judgment is general and not specific, and is not even notice to a prior purchaser so as to overreach payments subsequent to the judgment. (*Moyer v. Hinman*, 13 N. Y. Rep. 180.) But it is notice to subsequent purchasers, and although not a specific lien, may be enforced by execution. Here, however, the judgment lien is cut off by the record; for when we look at that, we find that a foreclosure and sale, regular in form, has taken place by which the creditors are barred of all equity of redemption. For a regular foreclosure by advertisement, and the sale made in pursuance thereof to a *bona fide* purchaser, is equivalent to a sale under a decree in equity, and is an entire bar of all claim of any person having a lien by judgment subsequent to the mortgage, who shall have been served with notice of sale. (2 R. S. 546, § 8, as amended in 1844, ch. 346, § 4.)

And the affidavits of such foreclosure, sale and notice, are presumptive evidence of the facts therein contained. (§ 12.) And it is further provided, that when the mortgagee or his assigns are the purchasers, these affidavits shall be evidence of the sale and foreclosure of the equity of redemption, in the same manner and with the like effect as a conveyance executed by the mortgagee upon such sale to a third person. (§ 4.) The record title in this case was therefore perfect, and in a suit at law would enable the defendants Brooks, Price, Bright and Wylie to recover the premises against all

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the parties to the statute foreclosure who had been served with notice. The affidavits are a statute conveyance, (27 *Barb.* 503,) and when they perform that office, the purchaser can no more impeach them, by parol evidence, than he could a conveyance by deed. (Bronson, Ch. J., in *Arnot v. McClure*, 4 *Denio*, 45.) But it is said the mortgagor and those claiming under him may impeach the sale. (*Id.* 44.) This can only mean that the mortgagor and those claiming under him may controvert the facts stated in the affidavits of sale. But here is no contradiction of any of the facts stated in these affidavits. *Blakeman*, it is true, *claimed* that there was a certain sum due upon the mortgage. But the proof is not offered to show that he did not *claim* it. It goes further, and shows that such *claim* was fraudulent as to the plaintiffs. So the case comes to this: that the statute conveyance is sufficient in form to pass a good title as against these plaintiffs; but outside of this is a matter which, when brought to the attention of the court, renders the sale fraudulent as to the plaintiffs. What is this outside matter, more than what appears in the case of a voluntary conveyance given to defraud creditors, or a conveyance by executors in fraud of an estate. *Bona fide* purchasers in all such cases are entitled to protection. It is not an answer to say that *Blakeman* took no valid title under the mortgage foreclosure, as against the judgment creditors. His title was not absolutely void, but it must be considered good as to the mortgagor who assented to it.

In *Jackson v. Henry*, (10 *John.* 185,) the power of sale in a mortgage was shown to be void, on account of usury in the original debt, (the statute declaring the usurious security utterly void,) yet it was decided that a foreclosure and sale under the statute could not be defeated in that way, to the prejudice of a *bona fide* purchaser.

The referee probably relied upon the cases of *Wood v. Colvin*, (2 *Hill*, 566,) and *Cameron v. Irwin*, (5 *id.* 272.)

In the first of these cases, Judge Bronson expressed an



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opinion that a *bona fide purchaser* would not be protected when the sale was made upon a judgment that was satisfied. This was asserted upon the technical theory that there is no longer any power to sell, yet he admits that if there has *been some fault* on the part of the judgment debtor, he may be estopped afterwards from alleging the payment to defeat the title of the purchaser. In the case before him, there was no *bona fide purchaser*, and what is said about the rights of *bona fide purchasers* in certain cases does not control this court, as authority.

But the case of *Cameron v. Erwin* is entitled to a more critical examination. It was there said, by Cowen, J., (although not necessary to the decision of the question before the court,) that payment of a mortgage extinguishes the power of sale contained in it, and if a statute foreclosure afterwards takes place, even a *bona fide purchaser* at the sale will acquire no title. The point actually decided was, that the assignee of the mortgage, when he became the purchaser at the sale, acquired no title.

This proposition is doubtless correct, for the simple reason that the assignee is in no better position than his assignor, and must abide by his title. At least, he is liable to all the equities of the mortgagor, though it would seem that he is not to be affected by mere outside equities residing in third persons, of which he has no notice. (2 *John. Ch. R.* 441, 479. 2 *Cowen*, 246, 298. 4 *Seld.* 273, *Johnson, J.*) But it is said by Cowen, J. in *Cameron v. Irwin*, that payment extinguishes the power of sale, and the case becomes the same as if none had ever been inserted in the mortgage, and that the mortgage “ceases to operate either at law or in equity, and the whole title reverts in the mortgagor.” \* \* \* “To call it a mortgage would be an abuse of the word. It is no more than a blank. It cannot be that a naked foreclosure by advertisement shall take away a man’s farm.” All this would be the undeniable conclusion, if the mortgagor was in a position to dispute the sale. It certainly is not true, when the

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mortgagor looks on, and without objection, sees his farm sold to a *bona fide* purchaser under a written power of sale in a mortgage which he knows is satisfied. Nor can the mortgagor be heard to allege payment of the mortgage when he has consented to its foreclosure. If, however, the foreclosure takes place without notice to him, or without his fault, after payment of the mortgage debt, the rule would doubtless be applied as rigidly as contended for by the learned judge in *Cameron v. Irwin*.

The statute regulating such sales has however been careful to require notice to be given to the mortgagor, and to all persons having any subsequent title to or lien upon the mortgaged premises. The object of the statute is apparent. And I think that after due notice to claimants, as required by statute, they cannot be heard to contest a regular sale, as against *bona fide* purchasers of the mortgaged premises. If they have any claim in equity superior to the title of the mortgage, which would invalidate the proceedings, they are in duty bound to assert it before the premises are conveyed to a *bona fide* purchaser. Unless we require them to speak when called upon by this notice, and assert their claims, the notice itself would be an idle ceremony, and no one would dare to bid at the sale.

We must therefore hold that persons thus having notice are estopped at law from disputing the validity of the mortgage as against *bona fide* purchasers. And it follows that notwithstanding the mortgage has been in fact paid, the mortgagor, having due notice of the foreclosure, cannot afterwards upset the title of a *bona fide* purchaser at the sale, by proving payment of the mortgage debt. To allow him to do this, would be a fraud upon subsequent purchasers, who had bought the mortgaged premises upon the faith of the mortgage and the default of the mortgagor to assert his claim. It is not a good answer to say that these statutory proceedings are not in court, and that the mortgagor is not required to contest them. The notice of such proceedings, with a claim

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against him for a certain amount due upon the mortgage, at least imposes upon him the duty of notifying purchasers at the sale, of his claim, or the duty of silence afterwards.

If he will not speak when duty toward others requires it, he will not be permitted to speak afterwards, when his interest prompts him to it. It cannot therefore be said that the title of the purchaser is absolutely void, because the mortgage was satisfied before the foreclosure. The parties to the power of sale, after it is extinguished by payment of the mortgage, still hold it out to the world as a valid power, and consent that the mortgaged premises may be sold under it. As to them, it will be held valid by way of estoppel, as was admitted by the judge who delivered the opinion in *Wood v. Colvin*. (See 12 Barb. 20, 21, *Willard, J.*; S. C., 5 Selden, 45.)

Chief Justice Spencer, in *Anderson v. Roberts*, (18 John. 527,) says: "No deed can be pronounced in a legal sense utterly void, which is valid as to some persons but may be avoided at the election of others. (*And see authorities cited by him.*) The decisions in 2 Selden, 147 and 449, are not opposed to this view of the case. The question then is narrowed down to one between two innocent parties, who have been defrauded by keeping the mortgage along as a valid security after it was paid. Although the plaintiffs were notified of the sale, they were ignorant of the fraud. As to them the sale was fraudulent and void; but the court will not disturb the title of a *bona fide* purchaser, in favor of the claim of a junior creditor to upset the sale on the ground of fraud.

The defendants *Brooks, Price, Bright* and *Wylie* purchased of the fraudulent grantee under the mortgage, and the fraudulent conveyance not being absolutely void, but only voidable at the instance of the party aggrieved, they are entitled to protection as *bona fide* purchasers, so far as they have paid the purchase money. (14 John. 407. 10 id. 185. 18 id. 515. *And see* 39 Maine Rep. 467.)

The plaintiffs, not having sold the premises under their

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execution, but having a new lien, are not in a condition to contest the equities of the subsequent purchasers from the fraudulent grantee.

If these plaintiffs had sold under their execution against the mortgagor before the subsequent conveyance from the fraudulent grantee, they might have prevailed instead of the defendants, for the reason that when two persons have equal equities, the maxim applies, *qui prior est in tempore potior est in jure*. (18 John. 515, 532.) Although this might depend upon the priority of conveyances as recorded. (9 Paige, 132.)

If the case stopped here the judgment might be modified by turning Blakeman into a trustee, and requiring him to account to these creditors for the proceeds of the sale to Price, Brooks, Bright and Wylie. (1 Paige, 147. Story's Eq. Jur. 395, § 1265.)

The next question is as to the \$1200 mortgage. If that was in fact paid, then there is no difficulty in sustaining the judgment so far as it requires its cancellation. But if it has not been paid, or even if it was satisfied by the conveyance of the mortgaged premises to Blakeman, the amount due upon it at the time is a valid lien upon the premises as to these plaintiffs, and must be allowed to him.

Whether it is regarded as a lien, or whether as a mere lien it is extinguished by his purchase of the equity of redemption of the mortgagor, the same result follows. The lien in one case, or the consideration of the purchase in the other case, to the extent of the lien, entitle him to protection against judgment creditors, who became such after the execution of the mortgage. Blakeman may doubtless be treated as a mortgagee in possession, and after retaining sufficient to pay the mortgage debt, he might be required to account to the creditors for the proceeds of the premises beyond that amount. The question then becomes an important one, whether the \$1200 mortgage was paid by the mortgagor, except by way of purchase of the mortgaged premises.

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As to the indorsements upon this mortgage of \$741 which had been paid before the plaintiffs' judgment, the arrangement of February 17, 1854, to cancel them and apply the payments to the purchase of a farm in Cazenovia, was inoperative as to the plaintiffs. The learned referee was doubtless right in holding that the lien of the mortgage, as to this \$741, could not be revived by the agreement of the mortgagor and the mortgagee, as to third persons who held *bona fide* incumbrances upon the mortgaged premises. (*Marvin v. Vedder*, 5 Cowen, 671.) It is more difficult to see how the balance was paid. One way in which it is suggested that payment took place, was the assignment of the insurance policy as collateral security, and the receipt by Blakeman of the insurance money after the destruction of the factory by fire. By a receipt of March 1, 1854, Robert Turner certifies that all this insurance money was applied toward the purchase price of the Cazenovia farm, which Turner bought of Blakeman, and that the indorsements which Turner paid to apply on this mortgage had been diverted to the same object, "which will leave the mortgage all clear from any indorsement, and all due to Eben Blakeman or his heirs or assigns." If the insurance money had been actually applied *prior* to this time to pay the mortgage, it must be regarded as satisfied as to these creditors. This receipt would seem to refer to the transaction of February 17, 1854. In that transaction, as found by the referee, the insurance money is stated at \$2138, and *was actually applied* as stated in the receipt. (11th finding.)

The indorsements on the \$1200 mortgage, amounting to \$740, were also taken off from the mortgage and applied in the same way, "leaving (says the referee) the full face of the \$1200 mortgage due as by this agreement."

There is some contradiction, but more confusion, in the evidence, as to the actual application of this insurance money to pay the \$1200 mortgage. It would seem that the policy was assigned to Blakeman as collateral security to pay the

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mortgage, and that when the transaction of February 17, 1854, took place, the money had not been received by Blakeman. It was therefore competent for the parties to direct the application of the money, when received, to another purpose. And I am not satisfied from the evidence that there was any new arrangement after February 17, 1854, by which any portion of this insurance money was withdrawn from the purchase price of the Cazenovia farm and applied upon the mortgage. At all events, the referee does not find, as a matter of fact, that the insurance money was ever applied to pay this mortgage; and we ought not therefore to assume it upon contradictory evidence. The conclusion of the referee in his seventh finding of law is, that as the bond and mortgage was surrendered to Turner "to be used by him as his own in raising money or in securing debts, and the bond still being held by Turner, opens a door through which the intervening judgment creditors enter with a paramount lien."

The only facts found by the referee upon which this proposition is based, are that "in the fall of 1854 Blakeman delivered this \$3000 mortgage to Robert Turner, with an assignment executed by him on the back of it, with a blank left for the name of the assignee, for the purpose of enabling Turner to use it as his own in obtaining or in securing debts owing by him; and Turner endeavored to use it for that purpose, but without success; *and the \$1200 mortgage and the bond accompanying the same, were at the same time delivered by Blakeman to Turner for a like purpose.*" (15th finding of fact.) And "after these mortgages were delivered and in his hands, Blakeman, in seeking to obtain a title to the premises, obtained from Robert Turner and wife the deed before mentioned, which was executed to Blakeman on the 18th day of November, 1854, and received by Blakeman on condition that it would give him a good title," (16th finding of fact;" but that after his return from the clerk's office to get it recorded, Blakeman was reminded of the plaintiff's judgment, "and having received a redelivery of the two

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mortgages from Turner, leaving the bond given with the \$1200 mortgage in his hands, procured an acknowledgment on the 27th day of November, 1854, from Whedon, of the assignment to him" of the \$3000 mortgage, got it recorded and commenced a foreclosure on the latter. (17th and 18th findings of fact.)

The defendants' counsel requested the referee to find, among other things, that Robert Turner was indebted to Blakeman at the time of the purchase of said premises, on the foreclosure, about \$1570, which is now unpaid. The referee refused to find it, although he leaves us in doubt whether he would not have found it, if he had thought it important.

It is therefore impossible to determine from the findings of fact that this \$1200 mortgage was ever surrendered up to Turner because it was paid and satisfied.

It would be consistent with the relation of the parties to each other to suppose that the object was to enable Turner to raise money on the \$3000 mortgage to pay the mortgage debt and other demands which it seems Blakeman held against him at the time. It would be unnecessary to negotiate the \$1200 mortgage if Turner could have obtained a loan upon the \$3000 mortgage; but it would be necessary, perhaps, for him to show that the prior \$1200 mortgage was not in the way. Quite likely it was to be canceled in that event. Having failed in obtaining a loan, there does not seem to be any legal obstacle in the way of his redelivering both mortgages to Blakeman. And although the referee has not found upon the question, he might perhaps find that Blakeman took back the mortgages and concluded to take back the mortgaged premises in consideration of \$2000, *and that part of the consideration was this very \$1200 mortgage.* The bond in that case would be retained by the mortgagor; and this circumstance would be no evidence of the invalidity of the mortgage, which was retained, perhaps, to protect his title, and which he would have a right to use for that purpose to the extent of what was actually



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due upon it, after deducting the \$740 indorsements. (7 *Paige*, 509, 511. 2 *Allen* [*Mass.*] 390.)

The referee finds that Blakeman himself was not informed of the agreement under which the \$3000 mortgage was executed. The condition of the mortgage was to pay that sum, and the agreement that it was intended as security for advances, &c. was never put upon record. He seems to have taken it to secure \$1000, and to have taken it in good faith for that purpose. He undertook to hold it as security for other moneys which Turner owed him, and to foreclose it to protect his title. This he could not do. (3 *Barb. Ch. Rep.* 293.) While, therefore, subsequent *bona fide* purchasers at the sale must be protected against the claim of intermediate creditors, he is in the position of an assignee of the mortgage, and took nothing by his foreclosure, as to these plaintiffs, except the naked title. But he is entitled to protection so far as the consideration of the deed from Turner and wife to him was made up from the moneys due and unpaid on the \$1200 mortgage. But we have not the facts before us upon which it would be safe to give a final judgment in this action. The plaintiffs are doubtless entitled to follow the subsequent conveyances to the extent of the unpaid purchase money, if they succeed in showing that the \$1200 mortgage is satisfied; or to a portion of it, if they succeed in reducing the \$1200 mortgage below the value of the premises.

If I am right in these views, it follows that the judgment must be reversed, and the cause sent back to the referee for further examination. It will be necessary for the referee to ascertain whether or not the \$1200 was in fact paid or satisfied before the purchase of the mortgaged premises by Blakeman, and if not, how much remained due and unpaid at that time. He must also ascertain and determine what amount remained due and unpaid by the defendants Price, Brooks, Bright and Wylie, respectively, on their several purchases from Blakeman, at the time of the commencement of this action; provided it shall appear, as we have assumed, that they pur-



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chased in good faith, and without knowledge or notice of the facts which rendered the foreclosure of the \$3000 mortgage fraudulent as to these plaintiffs. And the plaintiffs will be entitled to a judgment declaring the foreclosure of the \$3000 mortgage by Blakeman fraudulent as to them, and requiring Blakeman to account for the proceeds of the mortgaged premises and to assign to a receiver to be appointed, any securities which he may have for the unpaid purchase moneys growing out of the subsequent sales by him of the mortgaged premises. And the subsequent purchasers must account to the receiver for all moneys which were unpaid at the time of the commencement of this suit.

And after deducting the amount, if any, which shall be found due and unpaid to Blakeman upon the \$1200 mortgage, the balance only can be recovered by the plaintiffs, to apply upon these judgments.

But if these plaintiffs are satisfied with a judgment requiring Blakeman to account for the proceeds of the sales of the mortgaged premises, judgment might be entered accordingly, and then he must be required to pay over to the receiver the gross avails of such sales, less the amount which may be found due upon the \$1200 mortgage. The defendant Blakeman may perhaps be charged with costs; although this is not a matter of course, unless the referee is satisfied, upon the evidence, that he knew that the \$3000 mortgage was satisfied when he foreclosed it. If he knowingly undertook to use it to perpetrate a fraud upon these creditors, he ought to bear the expense of the litigation.

No costs should be charged to the other defendants, as the case now appears.

The costs of this appeal should abide the event.

BACON, J. concurred. MULLIN, J. dissented.

Judgment reversed, and new trial granted.

[ONEIDA GENERAL TERM, JANUARY 7, 1862. *Allen, Mullin, Morgan and Bacon*, Justices.]

MARY A. BLODGETT *vs.* THE CITY OF SYRACUSE.

The keeping of a house of ill fame is not an act of "carelessness or negligence" within the meaning of the 8d section of the act of April 13, 1855, which exempts counties or cities from liability for injury to, or destruction of, private property in consequence of a mob or riot, when such injury or destruction has been occasioned, or in any manner aided, sanctioned or permitted by the *carelessness* or *negligence* of the owner, and he shall not have used all reasonable diligence to prevent the injury.

THIS was an action to recover damages for injuries to the plaintiff's dwelling house, occasioned by a riot, or mob. The plaintiff, in the first count of her complaint, claimed that the defendant was liable under the statute of April, 1855, "to provide for compensating parties whose property may be destroyed in consequence of mobs or riots." (*Laws of 1855, ch. 428, p. 800.*) In the second count she claimed that the defendant was liable at common law. The 3d section of the act of 1855 provides, that "No person or corporation shall be entitled to recover in any such action, if it shall appear upon the trial thereof that such destruction was occasioned, or in any manner aided, sanctioned or permitted by the carelessness or negligence of such person or corporation; nor shall any person or corporation be entitled to recover any damages for any destruction or injury of property aforesaid, unless such party shall have used all reasonable diligence to prevent such damages," &c. By the 4th section of the act, the remedy against the individuals engaged in the riot is preserved. The defense to the action rested upon proof that the plaintiff, at the time and place of the injury complained of, kept a house of prostitution, which incited, or tended to incite, the rioters to commit the injury sustained by the plaintiff. It was agreed by the parties, before the court and under its direction, that no evidence of the amount of the damage should be given, but that the jury should determine whether the plaintiff was entitled to recover from the evidence, and that the damage should be ascertained afterwards by a referee. The court charged the jury that if she kept a

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house of prostitution, and the character of the house contributed to produce the riot, the keeping such a house was such carelessness or negligence as brought the case within the statute, and the plaintiff in that case could not recover.

The plaintiff requested the court to charge the jury by submitting the following propositions separately to them:

*First.* That if the plaintiff kept her house as a house of ill fame, it constitutes no defense to this action.

*Second.* That the character of the house is entirely immaterial.

*Third.* That the keeping of a house of ill fame does not of itself furnish any evidence that the injury complained of was "occasioned, or in any manner aided, sanctioned or permitted, by the carelessness or negligence" of the plaintiff.

*Fourth.* There is not sufficient evidence in this case that the plaintiff's house was a house of ill fame.

*Fifth.* And further, as a question of law, the evidence detailed does not justify the act complained of.

*Sixth.* Merely keeping a house of ill fame is not carelessness or negligence, within the meaning of the statute.

The court declined and omitted to charge the jury as above requested; and declined and omitted to charge the jury upon either of the propositions submitted, to which omission and refusal the plaintiff excepted. The court, among other things, charged the jury that it was for them to determine from the evidence whether the plaintiff at the time of the injury complained of kept a house of prostitution, at the place where the injury occurred. That if the jury found the house to have been a house of ill fame, and the character of the house contributed to produce the riot, the keeping such a house was such carelessness or negligence as brought the case within the statute, and the plaintiff was not entitled to recover. The plaintiff excepted to the charge.

The jury found for the defendant, and the plaintiff appealed to the general term, from the judgment entered upon the verdict.

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*Charles Andrews*, for the appellant. The charge was justified by the facts proved, and by the law under which the action was brought.

I. It was competent for the jury to find from the evidence that the plaintiff kept at the time and place of the injury a house of prostitution, and that the rioters did the injury for the purpose of breaking up the business of the plaintiff, and that they were incited by the character of the house and the acts of violence which had occurred there.

II. The remedy of the plaintiff against the city is wholly founded upon the statute, and not upon natural equity, or the common law. The statute is to be strictly construed against the plaintiff. It is clear that the statute was not designed to insure the property of offenders against the law, where the property injured was used at the time for illegal purposes, and such use incited the violence which caused the injury.

III. The keeping of a house of prostitution is a public common nuisance, and can be abated by any person, or by proceedings upon indictment. (3 *Bl. Com.* 5. 4 *id.* 168. *Wharton's Crim. Law*, 702. *Jennings v. Cone*, 17 *Pick.* 26. *Warren v. The People*, 3 *Par.* 545.) The remedy by abatement by individuals is in all respects concurrent with that by indictment. (*Renwick v. Morris*, 3 *Hill*, 621.) The distinction between abating a public or private nuisance is this: A public nuisance may be abated by any one; a private nuisance, only by the party injured. (*Lancaster Turnpike Co. v. Rogers*, 2 *Barr*, 114.) In *Meeker v. Van Rensselaer*, (15 *Wend.* 397,) it was held that a dwelling house, cut up into small apartments, inhabited by a crowd of people, in a filthy condition and calculated to breed disease, was a public nuisance which an individual might abate, especially during the prevalence of the Asiatic cholera.

IV. The injury in this case was in some manner "occasioned, aided, sanctioned or permitted, by the carelessness or

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negligence" of the plaintiff. (1.) In keeping a house of prostitution, she was violating the criminal law. (2.) By her act, she justified the remedy by abatement by individuals; a remedy naturally tending to a breach of the peace by individuals, who, entering upon the execution of the purpose of abatement in a legal manner, are led by excitement beyond the authority given them by the law. (3.) Houses of prostitution are held to be common nuisances, in part, because they endanger the public peace, and tend to incite violence—the very thing of which the plaintiff complains. Hawkins (*Pleas of the Crown*, ch. 74, book 1) says, "the keeping of bawdy houses comes under the cognizance of the temporal law as common nuisances, not only in respect of their endangering the public peace by drawing together dissolute and abandoned persons, but also in respect of their apparent tendency to corrupt the morals of both sexes." (1 *Russell on Crimes*, p. 323.) (4.) It would be difficult to give any construction to the statute, if it shall be held that the acts of the plaintiff in this case were not carelessness or negligence which in any manner occasioned, permitted or aided the production of the injury complained of, within the meaning of the statute.

V. The omission to charge, in the language of the request, that "merely keeping a house of ill fame is not carelessness or negligence within the meaning of the statute," was proper. The court, in substance, charged this proposition, by adding to it the qualification that the character of the house must have contributed to produce the riot. The reputation of the house and of the inmates frequenting it was competent evidence. (*Wharton's Crim. Law*, 703.)

*Geo. W. Gray*, for the plaintiff. I. The decision of the judge, admitting testimony going to show that persons of bad reputation occupied the house, was erroneous, and a new trial should be granted on that account. The character of

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the persons frequenting a public and *licensed* house is no evidence of "carelessness or negligence."

II. The plaintiff, in order to present the question relied upon by the defendant, submitted six propositions, which we ask the general term to review; and we especially refer to the sixth proposition, which is this: Is merely keeping a house of ill fame "carelessness or negligence," within the meaning of the statute. (1.) This proposition has no reference to the *manner* of keeping it, but *the fact* of doing so. (2.) Carelessness means "heedlessness," "inattention." (*Webster.*) (3.) Negligence means "neglect," "omission to do." (*Webster.*) (4.) The legislature intended, by the terms "negligence and carelessness," an omission to do something which, if it had been done, the riot would have been prevented. (5.) The plaintiff was entitled to the ruling of the judge upon this proposition, that merely keeping a house of ill fame was not "negligence or carelessness," within the meaning of the statute.

*By the Court*, BACON, J. I am a little apprehensive that the learned justice who tried this cause, in his just indignation against the infamous trade of the plaintiff, and his laudable zeal for the promotion of good morals, has been led to affirm a proposition which can hardly be sustained. This action is to be treated as brought under the statute of 1855, and the defense rests entirely upon the provision of the 3d section of that act, which exempts a corporation from liability for injury to, or destruction of, private property, when such injury or destruction has been occasioned, or in any manner aided, sanctioned or permitted by the carelessness or negligence of the person whose property has been destroyed, and he shall not have used all reasonable diligence to prevent the injury complained of. And the simple question, I think, is, whether the keeping of a house of ill fame is "an act of carelessness or negligence," within the statute.

The counsel for the defendant asked the judge to rule that

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it was not, and he refused to do so ; and to this refusal there was an exception.

It must be admitted that the statute is very loosely drawn, and the words "carelessness or negligence" may perhaps admit of a pretty wide interpretation. Normally, they mean heedlessness or inattention, and an omission to do something which operated proximately to bring about a result which would not have occurred if such carelessness or negligence had not existed. So that in respect to property which has been injured or destroyed by a mob, it seems to me the idea of the legislature was, that a party should not recover if he omitted some obvious precaution, or failed to exercise some care which, if it had been timely bestowed in view of a threatened or apprehended danger, would have averted the calamity.

It may perhaps be illustrated by supposing an individual to have a house filled with some combustible materials which, upon the approach of fire, he refuses to remove upon the application and urgent appeal of his surrounding neighbors. If, in such a case, a lawless mob should undertake to do the job for him, and in their hot haste and unregulated zeal should materially damage and despoil his premises, I do not suppose he could claim indemnity from the corporation.

This would be a case where it might very well be said that the destruction was occasioned by the negligence of the party who has suffered the damage, and which negligence operated as a proximate cause leading naturally to the result.

But can the keeping of a house of ill fame be called "an act of negligence or carelessness?" It is an act detestable in morals, and criminal within the provisions of the law—something indeed much worse than negligence or carelessness. The law affords an ample protection to the community by proceedings for the suppression of the nuisance, and if the public authorities had performed their duty, there would very probably have been no occasion for an exhibition of the virtuous indignation of a promiscuous crowd, many of whom

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were probably more intent on mischief than on vindicating outraged morality. It is always unsafe to let loose a multitude without legal restraint, and better to sustain some inconveniences, and even endure some wrongs until they can be redressed in the regular and due administration of justice, than to live under the jurisdiction of Judge Lynch, however valuable in their results his services have sometimes been.

It will be found difficult to put a limit to what may be deemed an act of carelessness or negligence, if so latitudinarian a construction is to be indulged. Suppose an individual should hold some opinion highly offensive to a large portion of the community, or indulge in practices deemed by many detrimental to the good order of society; would this be considered as conduct so careless or negligent that his house could by the aggrieved or offended parties be torn about his ears? I think no one would contend for quite so large a liberty as this would give to voluntary and unauthorized abators of what many might deem offensive and injurious.

The safety of community consists in the enforcement of legal remedies for proved or admitted wrongs; and it is better that indemnity should be provided for even worthless and unwholesome members of society, when they have suffered wrongfully, than to leave so large a discretion, and one so likely to be abused, in the hands of an irresponsible multitude.

My decided impression is, that an error was committed in the ruling on the trial, and that the judgment should be reversed, and a new trial granted, with costs to abide the event.

New trial granted.

[ONEIDA GENERAL TERM, JANUARY 7, 1862. *Mullin, Morgan and Bacon*, Justices.]



BRADY *vs.* BEGUN. \

The statutory provision that every conveyance of land held at the time adversely to the grantor, shall be void, has no application to conveyances made by the *state* as grantor.

Where the defendant entered under a contract with the state to purchase the premises, as the representative of S., the first purchaser, through several mesne assignments; made some small payments thereon; endeavored to effect an arrangement to pay the balance; and frequently spoke of the claim and title of the state, and of himself as holding in subserviency to it; *Held* that his possession was to be deemed in subserviency to the title of the state, and not adverse.

And the defendant having been twice put out of possession of the premises, by process instituted by the state, both in 1847 and 1848; *held* that there had been no continuous possession in the defendant, but the chain had been twice broken by legal process and under a paramount claim.

The presumption of payment of the purchase money by one in possession of land under a contract to purchase, arising from lapse of time, cannot be interposed as an affirmative defense to an action to recover the possession of the land. If the presumption is interposed, the fact upon which it proceeds must be affirmatively proved.

A patent, issued by the state, conveying its own lands, will be presumed to have been issued regularly; and if it be not void on its face, cannot be avoided collaterally, in a suit between individuals.

It is not incumbent on the grantee to show that the sale of the land was properly and fairly conducted, and that the necessary preliminary notices and advertisement were given and published.

If there be any allegation or pretense that a patent was issued by mistake, or upon a false suggestion, it is voidable only, and in such a case can be avoided only by a direct proceeding to cancel and annul the patent.

**T**HIS action was brought to recover of the defendant possession of about sixty-three acres of land situate in the town of Verona, Oneida county, and damages for the detention thereof. The action was referred to a referee, who found the following facts :

Lot No. 97 of the Oneida reservation, in the town of Verona, Oneida county, was sold by the state to George Brayton, and he received the usual certificate of sale from the surveyor general, dated April 2, 1807. From this lot No. 97, sixty-three acres, two roods and fourteen rods, (being the premises in question in this action,) were set off to George Seaton, and

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a new account opened with him in the comptroller's office; the usual certificate from the comptroller was issued to him, bearing date April 24, 1813, and the amount then unpaid thereon was \$131.49. This certificate issued to Seaton was transferred several times, and finally came to be held by Nathan Begun, the defendant, who went into possession of the premises, in 1822, and has continued to occupy them to this time, except as he was dispossessed by the sheriff, as hereinafter stated. The amount due on the certificate remained unpaid, and in October, 1844, the premises were sold for the arrears, by the surveyor general, and bid off for the state, and subsequently were sold to one Hugh McNamara, who received the usual certificate from the surveyor general, dated January 17, 1845. This certificate, issued to McNamara, was transferred to Bernard Brady, who paid up the balance due the state and received a patent for the premises, dated February 2, 1854. Previous to the issuing of this patent, and in pursuance of authority from the commissioners of the land office, proceedings were commenced and a warrant issued by Hon. P. Sheldon Root, first judge of the court of common pleas of the county of Oneida, to the sheriff of the same county, who on the 19th day of May, 1847, dispossessed Begun and put McNamara into possession, and on the 22d day of April, 1858, he again dispossessed Begun and put Bernard Brady into possession. Bernard Brady died intestate before the commencement of this action, and the plaintiff is his only child and heir at law. A fair rent for the premises in question is twenty-five dollars a year, for any year within ten years past. There was no evidence introduced on the trial that the resale of the premises in question by the state for arrears was regular and fairly conducted, and that sufficient and proper notice of such resale was given or advertised, according to the requirements of the statute, except as appears in this case. At the time of the resale of said premises, and the issuing of the certificate to Hugh McNamara, January 17, 1845, and the transfer of said certificate to Ber-

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nard Brady, and the issuing of the patent of said premises to Bernard Brady, February 2, 1854, the defendant occupied and possessed said premises, (except as he was dispossessed by the sheriff in the manner above stated,) and claimed them as his own.

The defendant, to maintain his defense, among other things, introduced in evidence the comptroller's certificate of the sale of the lot in question, and several assignments of the same, showing that August 30, 1822, he was a joint owner with Albert Begun of the interest conveyed by the certificate, and that March 14, 1828, he became the absolute owner of the same. The defendant further proved that he went into the possession of the premises in 1821, and had continued to occupy them uninterruptedly, under claim of title, to the commencement of the suit in 1855, except when dispossessed by the deputy sheriff, in 1847 and 1848. This dispossession turned out simply to be the going on to the premises by the officer, declaring them to be in the possession of McNamara, or Brady, who then lived in Albany, and then leaving, while Begun continued to occupy them in fact all the time.

The following were the conclusions of law reached by the referee: 1. That the possession of the defendant has been in subserviency to the title of the state and its grantees, and has not been at any time an adverse possession. 2. The want of possession in a grantor does not render void a patent from the state. 3. That the possession of the defendant of the premises in question at the time of the sale of the same by the state to Hugh McNamara, and also at the time of the sale and conveyance of the same by the state to Bernard Brady, does not render such sales and conveyances, or either of them, absolutely void, and prevent the transfer of any title from the state. 4. That the presumption of payment arising from lapse of time is no defense to an action of ejectment to recover possession of the premises in question. 5. That the plaintiff has established a title in fee simple to the premises described in the complaint, and that said patent from the

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state to Bernard Brady is valid and not void. 6. That the plaintiff is entitled to recover of the defendant, by way of rent and as damages for the detention of the premises, the sum of one hundred and fifty dollars. 7. That the plaintiff is entitled to a judgment against the defendant for the possession of said premises and for his damages, with costs to be taxed.

The defendant excepted to the decision of the referee in several particulars; and appealed from the judgment entered upon the report.

*H. T. Jenkins*, for the appellant.

*F. Kernan*, for the plaintiff.

*By the Court*, BACON, J. There are three grounds put forth by the defendant in defense of this suit, neither of which seem to me to be tenable.

1. It is claimed that there was an adverse possession on the part of the defendant, of the premises in question in this suit, which of itself constitutes a perfect defense to the action; or if this does not *per se* defeat the plaintiff's title, the fact of such adverse possession existing at the time of the conveyance by letters patent from the state to Bernard Brady, the ancestor of the plaintiff, rendered that conveyance void.

Upon the question of fact whether the possession of the defendant was adverse, the conclusion of the referee, that the possession of the defendant was in subserviency to the title of the state, and was not at any time adverse, is fully sustained by the evidence. The defendant entered under a contract to purchase the premises as the representative of Seaton, the first purchaser, through several mesne assignments; he made some small payments in 1832 and 1833; he endeavored to effect an arrangement to pay the balance, and frequently spoke of the claim and title of the state, and of himself as holding in subserviency to it. A claim to hold adversely under all these circumstances cannot be deemed to have been

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made in good faith, or with the slightest belief that he could found upon such claim a pretense to set not only the state, but all the world at defiance.

Such being the clear conclusion in regard to the fact of the alleged adverse possession, the proposition of law that the sale of the premises by the state to McNamara, and the subsequent patent to Brady, were null and void within the statute, which provides that every conveyance of land held at the time adversely to the grantor, shall be void, has no special importance. If in fact the premises were not, at the time the patent was executed, so held, the statute does not, of course, apply to the case. But if we were to concede the adverse possession, the result would not follow that is claimed by the defendant. The statutory provision above alluded to has no application to conveyances made by the state as grantor, as was expressly held in the case of *Jackson v. Gurmer*, (2 Cowen's Rep. 552.)

The reason which forbids such transfer of title by one individual to another, is to prevent champerty and maintenance, and the granting of pretended titles, to the stirring up of strife, litigation and oppression—a reason not applicable to the state when it parts with its domain, and therefore, as Ch. J. Savage says, in the case above cited, the reason failing, the rule fails, as to the state.

It may be added also, upon the point of adverse possession, that the defendant was twice put out of possession of the premises by process instituted by the state, both in 1847 and 1848. There has consequently been no continuous possession in the defendant, but the chain has been twice broken by legal process and under a paramount claim.

2. It is insisted that a legal presumption arises in this case, of payment by the defendant for the premises, arising from lapse of time. This proposition is sought to be established by, or rather inferred from, the principle which authorizes such an inference in the case of a sealed instrument, from the fact that no payment has been claimed or made.

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thereon for a period of twenty years. The effect of the rule is that of a statute of limitations, and it has usually been employed to defeat a recovery upon the instrument itself.

I know of no case in which it has been effectually interposed as an affirmative defense to an action of ejectment to recover the possession of land. If it is so interposed, the fact upon which it proceeds must be affirmatively proved. Such is substantially the principle established in the case of *Lawrence v. Ball*, (4 Kern. 477.) There the vendor had executed a written contract for the sale of the premises, stipulating for various payments. More than 20 years having elapsed, the vendor brought ejectment, treating the contract as forfeited for non-payment, and the court held that the presumption of payment arising from lapse of time was not sufficient to maintain the defendant's equitable claim to the land, and that to establish such a defense, payment, in fact, of the purchase money by the defendant must be proved. The mere fact of non-payment gives no title to equitable relief, and consequently constitutes no defense to an action of ejectment by the party holding the legal title.

In this case it need only be said that there was no proof of payment by the defendant, but that the defendant conceded the fact that he had not made any payment within 20 years, and that his rights had been forfeited and lost by reason of such non-payment.

3. It was finally claimed by the defendant, on the trial, that it was not enough, on the part of the plaintiff, to produce the patent of the state conveying the premises to Bernard Brady, but that it was incumbent on her to show that the resale of the land was properly and fairly conducted, and that the necessary preliminary notices and advertisement were given and published; in other words, that the patent was not *prima facie* proof of the plaintiff's title, but the regularity of all the prior proceedings must be shown. The cases cited by the defendant's counsel to sustain this proposition are none of them cases of conveyances by the state of its own

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lands to purchasers thereof. They all arose under sales and conveyances made by the comptroller and other public officers, for lands which had been sold for taxes, and where the effect of the conveyance would be to subvert the title of the *real and bona fide* owner of the premises conveyed. The rule applicable to such a case, as stated by Judge Bronson, in *Sharp v. Spier*, (4 *Hill*, 86,) is that every statute authority in derogation of the common law to divest the title of one and transfer it to another, must be strictly pursued, or the title will not pass. Upon this principle it is that all the other cases proceed, which, as I have said, are all cases of deeds by the comptroller, or by a collector, or by the municipal authorities of a civil corporation, for lands which had been sold for non-payment of taxes, or assessments made thereon.

It is obvious that this principle does not apply to a case where the state is granting and conveying its own lands to a purchaser thereof, as is conceded by the court in the case of *Varick v. Tallman*, (2 *Barb.* 115,) and where Judge Gridley quotes approvingly a decision in 1 *J. J. Marsh.* 447, to the effect that the presumption is that the public officers have done their duty in regard to the several acts required by them to be done in granting lands, and therefore surveys and patents should always be received as *prima facie* evidence of correctness. This doctrine is expressly held in *Jackson v. Marsh*, (6 *Cowen*, 281,) to wit, that a patent of lands by the state shall be presumed to have issued regularly, and if it be not void on its face cannot be avoided collaterally in a suit between individuals. If there is any allegation or pretense that it was issued by mistake, or upon a false suggestion, it is voidable only, and in such case can be only avoided by a direct proceeding to cancel or annul the patent.

I am accordingly of opinion that the judgment in this case is right, and should be affirmed.

Judgment affirmed.

[ONONDAGA GENERAL TERM, April 8, 1862. *Mullin, Morgan and Bacon*, Justices.]

CLAFLIN and others *vs.* THE FARMERS AND CITIZENS' BANK  
OF LONG ISLAND.

An agent cannot, in general, act so as to bind his principal in matters touching his agency, where he has an adverse interest in himself. But there is an exception, in the application of this principle, in favor of the holders of negotiable paper acquired in good faith before due, for value, without notice of the misconduct of the agent, or the knowledge of such facts as would amount to a want of good faith in the taker of such paper.

Where the president of a bank, having authority as such to certify checks drawn upon the bank, certifies his own checks, and the checks of another person, and delivers them to the payee, who thereupon pays to the drawers the full amount of the face of such checks, and transfers and indorses the same to a *bona fide* holder, the latter can enforce the payment of the checks by the bank; notwithstanding the drawers had no funds in the bank, at the time the checks were drawn.

No presumption of bad faith in the holder necessarily arises from the identity of the names of the drawer and the president of the bank; nor will the certification of his own check by the president of a bank be conclusive, as evidence, to deprive the holder of the protection afforded to *bona fide* holders of negotiable paper.

**A**PPEAL from a judgment entered on the report of a referee. The complaint averred that the defendants are a corporation created by and under the statutes of the state of New York, and transacting business at Williamsburgh, in the county of Kings. That at the dates of the several instruments hereinafter mentioned, one Charles W. Houghton was the president of the said bank, and as such had power and authority to accept drafts and certify checks drawn upon the said bank, and to bind the said bank thereby. That on or about the 31st day of December, 1853, one Thomas Green drew his draft or check in the words following:

“ No. *Williamsburgh, Dec. 31, 1853.*

Farmers and Citizens' Bank of Long Island, pay to the order of W. A. Cleaveland five thousand dollars.

\$5000. *THOS. GREEN.*

[Good. C. W. Houghton, Pres.”]

And then and there delivered the same to the payee thereof. That said draft or check was presented to said defendants,



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and that said defendants by their said president accepted the said instrument in writing; and said Charles W. Houghton, so acting as said president, then and there in writing, on the face of said check or draft, certified the same in the words following: "Good. C. W. Houghton, Pres." That said check or draft was indorsed by said payee, and so indorsed, accepted and certified, was by him transferred and delivered to the plaintiffs. That the said draft or check was presented to the defendants for payment, who then and there refused to pay the same, and that the same remains wholly unpaid. For a second cause of action, the plaintiffs alleged that one C. W. Houghton drew his draft or check upon the same bank, dated February 4, 1854, for \$5500, payable to the order of W. A. Cleaveland. That the defendants by their said president accepted the said instrument in writing, and said Charles W. Houghton acting as such president then, and in writing on the face of said check or draft, certified the same in the said filling, "Good. C. W. Houghton." That said check or draft was indorsed by said payee, and so indorsed, accepted and certified, was by him transferred and delivered to the plaintiffs. That the said draft or check was presented to the defendants at their banking house for payment, who refused to pay the same, and that the same remains wholly unpaid. For a third cause of action, the plaintiffs alleged the drawing of another draft upon the same bank, by the same drawer, dated February 25, 1854, payable to the order of W. A. Cleaveland, for \$10,000. Which check was accepted by said Houghton as president, in the same manner as the others, and certified by him to be "good." And that said check or draft was indorsed by the payee, and so accepted and certified, was by him transferred and delivered to the plaintiffs. That the said draft or check was presented to the defendants at their banking house for payment, who refused to pay the same, and that the same remains unpaid. The plaintiffs averred that said checks were wholly unpaid. Wherefore they

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demanded judgment against the defendants for \$20,500, and interest.

The defendants, by their answer, denied that Houghton was the president of the bank and as such had power and authority to accept drafts or certify checks upon the bank, or to bind the bank thereby. They also denied the delivery of the several checks to the payee; the presentment thereof to the bank; the acceptance thereof by the bank, by its president; the indorsement by the payee; the transfer or delivery to the plaintiffs; or the presentment for payment, &c.

And for further answer to the complaint, the defendants allege that the several drafts or checks mentioned and described therein, were drawn or made, and if certified, as set forth in said complaint, were certified at the office of the Long Island Water Works Company, Nos. 45 and 46 Merchant's Exchange, in the city of New York, and not at the banking house of the defendants, without authority, and when neither said Thomas Green or said Charles W. Houghton had money or funds on deposit in said Farmers and Citizens' Bank to enable said bank or said defendants to pay the said drafts or checks, or either of them. And that the defendants or said bank were never informed in any manner by said plaintiffs or said Cleaveland, or by any other person, that said several alleged drafts or checks were drawn or certified, as alleged in said complaint, until about the time of the commencement of this action; nor that said alleged drafts or checks were held or claimed in any manner by said plaintiffs, until the service of the said complaint and summons in this action. The defendants further alleged, that the amount of the several drafts or checks mentioned and described in the complaint was paid said Cleaveland in full by said Thomas Green, shortly after the drawing of said drafts or checks by said Green, to said Cleaveland, to wit, before the alleged transfer and delivery of said drafts or checks to the plaintiffs; and at the time of said payment, and oftentimes since, Cleaveland promised to return said drafts or checks to said Green, but ex-

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cused himself for not doing so by alleging that said checks were in his box at his residence in Brooklyn. That each and all of the said drafts or checks was or were transferred and delivered by said Cleaveland to the plaintiffs, if the same or either of them was or were transferred or delivered to said plaintiffs, without consideration and for the accommodation of said Cleaveland; and said checks, and each of them, were drawn and delivered respectively by said Greene and Houghton to said Cleaveland, usuriously and in contravention of the statutes of the state of New York against usury, and a sum greater than seven per cent was agreed on and reserved for the money advanced respectively on said drafts or checks; to wit, one eighth of one per cent a day—to wit, nine thousand dollars—to wit, 45½ per cent per annum; and the same was accepted and received by said Cleaveland, and he never had any other or different title to said drafts or checks, or either of them.

The action was referred to a referee, who found the following conclusions of fact:

*First.* That the three checks set forth in the complaint were drawn by the respective drawers thereof on the days of their several dates, and severally accepted and certified, indorsed and delivered, as therein alleged. *Second.* That the said checks, at the times they were respectively drawn and delivered to the payee therein named, were so accepted and certified by C. W. Houghton as president of the said bank, and he at the time of such acceptance and certification was the president of the defendants' bank, and as such president authorized by such bank to certify checks drawn upon said bank: such checks were so certified by said Houghton, at his business office in the city of New York, but of that fact the plaintiffs, when they received the same and paid the money thereupon, had no notice. *Third.* The said checks so certified were each of them, on the several days they respectively bear date, delivered to the payee thereof, who, upon receiving them, paid to the respective drawers of them, upon the same

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days, the full amount of the face of each check. *Fourth.* The payee of such checks on the same day, of the respective dates of them, respectively indorsed and transferred the same and each of them to the plaintiffs; and the plaintiffs, when they received the said checks, respectively, paid to the payee thereof the full amount of the face of each check, and that the said plaintiffs so received the said checks in good faith. *Fifth.* The plaintiffs have ever since the said checks were severally passed to them as aforesaid been the actual holders of them and each of them. *Sixth.* On or before the first day of December, 1854, the plaintiffs presented the said checks to the defendants at their bank for payment, and payment thereof was demanded and refused. *Seventh.* The amount of such checks, with interest thereon from the first day of December, 1854, was \$26,224.

Upon these facts the referee determined as matter of law, *First.* That the defendants were liable upon such checks by reason of such certification of them by the president of such bank. *Second.* That the plaintiffs were entitled to judgment for \$26,224, with costs.

To which findings and conclusions the defendants excepted, and appealed from the judgment entered upon the report.

*Wm. Curtis Noyes and John M. Martin*, for the appellants.

*C. O'Connor and John E. Burrill*, for the respondents.

*By the Court*, LEONARD, J. An agent cannot, in general, act so as to bind his principal in matters touching his agency, where he has an adverse interest in himself. (*Stone v. Hayes*, 3 Denio, 575. *Bentley v. The Columbia Ins. Co.*, 17 N. Y. Rep. 423.) There is an exception in the application of this principle in favor of the holders of negotiable paper acquired in good faith before due, for value, without notice of the misconduct of the agent, or the knowledge of

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such facts as would amount to a want of good faith in the taker of such paper.

In the case before us, the interest of Houghton is assumed to be at variance with his duty. His interest was an inducement to him to certify his own checks without funds. It was his duty not to do it. The public, however, cannot be apprised, from the face of the checks, of the existence of this conflict between interest and duty. The president of the bank may have money there on deposit as well as another man. The money being in bank, the certification of his own check would not be adverse to the duty of the president. As between the bank and its own officer, it is entirely clear that such a certification would create no liability. The general authority to certify checks had been conferred by the bank on its president.

The identity between the name of the drawer and the president of the bank who certified the check, did not necessarily inform any one, by the mere force of that fact, that the drawer had certified his own checks without funds in bank. It was possible that he had so done. It was not probable, however; and the usual presumptions of innocence and fair dealing were against the existence of doubts about the conduct of the president of the bank.

The presumption of bad faith, on the part of the plaintiffs, does not necessarily arise from the manner of certification. That fact, with other circumstances, might have brought the referee, or a jury, to the conclusion that there was a want of good faith on the part of the plaintiffs in taking the checks, but the certification in the manner mentioned was not conclusive as evidence to deprive the plaintiffs of the protection afforded to bona fide holders of negotiable paper. (20 *How. U. S. Rep.* 345. *Story on Bills*, § 194. 34 *Eng. L. and Eq.* 131.)

The legal principles respecting the subject of agency, as applicable to the certification of checks, their character and negotiability, and the protection to which bona fide holders

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thereof are entitled, are fully considered by the court of appeals in *The Farmers and Mechanics' Bank of Kent Co. v. The Butchers and Drovers' Bank*, (14 N. Y. Rep. 634, and 16 *id.* 125,) and are controlling, as far as they are applicable in the case now before the court.

We agree with the referee, that the defendants cannot now urge any reasons against a recovery arising from the delay occurring before the checks were presented for payment, after having, by objections at the trial, prevented the explanations offered by the plaintiffs in that respect.

The several objections taken during the progress of the trial, to the admission or exclusion of evidence, &c., so far as they were urged at the argument, have been examined, but none of them are considered well taken, and do not seem to require an extended review.

The judgment is affirmed with costs.

[NEW YORK GENERAL TERM, May 6, 1861. *Clerke, Mullin and Leonard, Justices.*]

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GODDARD and others vs. POMEROY and others.

A testator, by his will, gave to his wife, after the payment of his funeral expenses and all honest debts, all his personal estate absolutely, except \$1000 due him in notes, and the interest of that \$1000 during her life. He also gave her the whole income of all his real estate, for life, absolutely. He then gave to three other persons, E., H. and P., legacies amounting in the aggregate to \$3500, which were not to become due until after the decease of his wife. He next gave "the whole remaining part of all my worldly property which it is supposed will exceed \$3000," to the Baptist church in York, upon certain conditions, one of which was as follows: "That the legacy be kept by the church in perpetual fund, on interest, and interest applied for the purpose of remunerating the services of some faithful minister of Christ, and of the Baptist order, who shall be employed by the church as their missionary, in preaching the gospel in the destitute regions of the west."

*Held* 1. That having no power to take by devise, for any purpose, the church acquired no right, but the devise and the trust founded upon it, were en-

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tirely void, and the estate descended to the heirs at law, subject to the life estate of the widow, at the death of the testator.

2. That the trust to provide for the payment of the salary of a missionary to be employed in preaching the gospel in the destitute regions of the west was void, for the reason that the object of the charity was too vague and uncertain, and the testator had failed to express his purpose with sufficient clearness and precision to enable the court to decree its specific execution. And that were it any other than a charitable trust, it would be clearly void for want of any certain beneficiaries who could enforce it.
3. That the testator intended that the three legacies to E., H. and P. should be principally paid out of the real estate, although they were not to become due until the death of the testator's widow; an intention being manifest, from the whole will, to give to the Baptist church only the part of the estate which should remain after the other legacies were paid and satisfied.
4. That the charge upon the real estate, for the payment of the legacies, followed the estate in the hands of the heirs at law.

Religious societies incorporated under the act of 1813 are not expressly or even impliedly authorized to take lands by devise, for any purpose whatever, when such devise is made after their incorporation.

A gift to a charity, if there is a competent trustee, although there is no ascertained, or ascertainable, beneficiary, may still be upheld, provided the charitable use is so clearly and certainly defined as to be capable of being specifically executed and enforced, as intended by the donor, by judicial decree.

CONTROVERSY submitted to the court, by agreement of the parties, without suit, as authorized by the code. The following are the facts upon which the claim, and the rights of the parties, depended. On or about the 18th day of February, 1836, Josiah Goddard, of the town of York, in the county of Livingston, made and executed his last will and testament, by which (after omitting the formal introduction) he devised and directed as follows:

“After my doctor's bills, funeral expenses, and the cost of a decent monument erected at my grave is paid, and other honest debts, if any there be unsettled, I give the whole of my personal estate of every description to my wife Elizabeth, except one thousand dollars of the money that is due to me in notes; the principal of which I do not give to her, but the interest of which I do give to her, during her life, to her and to be her's, and at her disposal forever. And I further-

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more give to my said wife the whole income and the sole control of all my real estate, during the time of her life, to her and to be her's, and at her disposal forever. Note: None of the legacies which follow, and are described below, will become due till after the decease of my wife, and they are as follows:

*First.* I give to Elizabeth Faxton, now Elizabeth Bond, wife of Hollis Bond, living in the town of York, and county of Livingston, two thousand and five hundred dollars, to her, her heirs and assigns forever.

*Secondly.* I give unto my eldest sister, Huldah Goddard, living in the town of Grafton, and county of Worcester, and state of Massachusetts, five hundred dollars, to her and her assigns forever.

*Thirdly.* I give unto my youngest sister, Polly Goddard, now Polly Wheeler, wife of Asa, living (as is supposed) in the town of Leicester, and county of Worcester, and state of Massachusetts, five hundred dollars, to her and her assigns forever.

*Fourthly.* The whole remaining part of all my worldly property, which is supposed will exceed at least three thousand dollars, I give unto the Baptist church of Christ, in the town of York, in Livingston county, and state of New York. This legacy is given to the church above mentioned, on the following conditions:

1st. That the church, as soon as convenient after they shall have come to the knowledge of the legacy, shall vote to receive it.

2d. Provided the *church* shall continue to maintain their visibility, as a regular Baptist church, upon the foundation of the same gospel doctrines which they now profess and receive.

3d. That the legacy be kept by the church, in perpetual fund, on interest, and interest applied for the purpose of remunerating the services of some faithful minister of Christ, and of the Baptist order, who shall be employed by



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the church, as their missionary, in preaching the gospel in the destitute distant regions of the west.

4th. Provided, likewise, that the church choose a board of trustees, or board of committee, in number not less than five, to whom may be intrusted the safe funding of the money, collecting the interest, and procuring a suitable person, whom they may appoint by the advice of the church as their missionary, and settle with him all pecuniary concerns, and to whom it shall be his duty to make returns of his travels, labors, success, and whatever concerns his mission.

These conditions it is not expected will be attended to punctiliously, but in substance; on which conditions, if the church shall see fit to vote the reception of the legacy, it is given, but otherwise it is not given.

If this legacy is not received by the church, it is not to revert back to the other legacies as described above, to increase them, but directions will have been given to my administrators how to dispose of the money."

It was agreed that the Baptist society of York was duly organized under the act authorizing the formation of religious societies, passed April 4, 1813, prior to the execution of said will, and was an existing corporation at the time of the death of Josiah Goddard. That afterwards, and on or about the 19th day of February, 1836, the said Josiah Goddard departed this life at the town of York. That subsequently, and on or about the 22d day of April, 1836, the said will was duly admitted to probate, by and before the surrogate of the county of Livingston, and was duly recorded as a will of real and personal estate, and letters testamentary were thereupon duly issued to Elizabeth Goddard, the executrix named in said will. That subsequently, and on or about the 22d day of May, 1854, Elizabeth Goddard, widow of the said Josiah Goddard, departed this life, and Spencer Pomeroy, the executor named in the said last will and testament of the said Josiah Goddard, deceased, being appointed under said will, became acting executor of said

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estate, under said will. That the said Josiah Goddard, at the time of his decease, was seised in fee simple of certain real estate, particularly described in the submission. That the said real estate was the only real estate of which the said Josiah Goddard died seised, and is now of the value of about \$2000. That the said Josiah Goddard, at the time of his decease, left him surviving the following heirs at law, to wit: Polly Wheeler, a sister of the deceased, Huldah Goddard, a sister of the deceased, Charles Goddard, Lucy H. Stiles and Mary P. Bailey, children of Perley Goddard, a deceased brother of the said Josiah Goddard, Edward P. Goddard, a child of Joseph Goddard, a deceased brother of the said Josiah Goddard, and Lucy Goddard, a child of Ann Goddard, a deceased sister of the said Josiah Goddard. That the said Polly Wheeler has since died intestate and without issue, and is now represented by Joseph A. Denney as her administrator, &c. That the said Huldah Goddard has since died intestate and without issue, and is now represented by Charles Goddard as her administrator, &c. That the persons before named were the only surviving heirs at law of Josiah Goddard at the time of his death, and that the persons so named and the representatives of such as are deceased are the only persons having any interest in this controversy, excepting only the persons or corporation named as legatees in said will and such persons as are named defendants herein. That the said Josiah Goddard, at the time of his death, left personal property to the amount of about \$3000. That of the several bequests made in the said will of the said Josiah Goddard, the sum of \$2500 given to Elizabeth Bond, wife of Hollis Bond, by the terms of said will, has been paid in full out of and from other assets than the real estate and the rents and profits of the same. That of the bequest made in said will to Huldah Goddard, there remains due and unpaid the sum of \$612, with interest thereon from the 1st day of April, 1861. That of the bequest made in said will to Polly Wheeler, there remains due and unpaid the sum of

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\$612, with interest thereon from the 1st day of April, 1861. That all the personal property left by said Josiah Goddard, deceased, for that purpose, has been applied to the payment of the legacies mentioned in the first, second and third clauses of the will. That the said Baptist church of Christ, of the town of York, has complied substantially with all the conditions annexed to the legacy mentioned in the fourth clause of the will, excepting only that no portion of the said bequest mentioned in said will has yet been applied by said society to the support of a minister of the Baptist denomination, as contemplated in the fourth clause of said will, but the rents and profits of the real estate hereinbefore described still remain in the hands of the said Spencer Pomeroy, or the said Baptist society of York, to the amount and in the manner hereinafter stated. That the said Spencer Pomeroy, after the decease of the said Elizabeth Goddard, wife of the said Josiah Goddard, and on or about the 23d May, 1854, entered into the possession of the real estate, and remained in possession of the same down to the 14th August, 1858, and was in the receipt of the rents and profits thereof to that date. That the annual rents and profits over and above all taxes, repairs, charges and deductions of every kind, so received by the said Spencer Pomeroy, amount to the sum of \$80 for each and every year since the said 23d May, 1854, while he so retained possession of the same. That the Baptist society of York has been in the possession of said premises, and in the receipt of the rents and profits of said real estate, from the said 14th day of August, 1858. That there is now in possession of said society, of rents received from said property from the date last aforesaid to August 20, 1861, \$26, the balance of said rents having been expended in repairs on said premises. And from the 20th day of August, 1861, the rents and profits of said premises are to be estimated against said society at the rate of \$90 per annum, over and above all deductions for any account whatever. For the rents and profits so found and accruing in the hands of said society,

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judgment is to be rendered in manner and effect as against the said Spencer Pomeroy. That the Baptist society of York is the same organization and corporation mentioned in said will as the Baptist church of Christ, of the town of York.

The questions submitted to the court upon this case were as follows: Is the bequest contained in the will of Josiah Goddard, deceased, hereinbefore set forth, and designated in said will as "*fourthly*," by which the "whole remaining parts" of his property, after certain specific bequests, is given to the "Baptist church of Christ, of the town of York," a valid bequest or devise; and did said society take title to the property herein described upon the trust and for the purpose mentioned in said will, or take any right or interest whatever under said will? Are the unpaid balances of the legacies mentioned in said will, as given to Polly Wheeler and Huldah Goddard, a charge upon the real estate hereinbefore described? The court to determine the right of the respective parties in this controversy, and render judgment accordingly. If these questions were answered in the affirmative, then judgment was to be rendered against the claim of the heirs at law of Josiah Goddard to the said real estate, and the same was to be decreed as belonging to said Baptist church, subject to and charged with the unpaid balance on said legacies to Polly Wheeler and Huldah Goddard, and subject to the trust created in and by said last will and testament, should the court determine that said unpaid legacies are chargeable upon the said real estate, and that said fourth bequest and the trust created thereunder is valid. If the first of said questions was answered in the negative, then judgment was to be rendered against the claim of said Baptist society to the real estate, or to any claim or interest whatever under said will; and the said property and the rents and profits of the same were to be decreed as belonging to said heirs at law of Josiah Goddard, subject to and charged with the payment of the unpaid balance of the legacies given to Polly Wheeler and Huldah Goddard, should the court determine

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that the unpaid balance of said legacies was a charge upon said real estate. And further, the said Spencer Pomeroy and the Baptist society of York were to be decreed to pay to the plaintiffs the rents and profits of said real estate so found in their respective hands, and the interest thereon, and judgment be taken against them in proper form therefor.

*L. N. Bangs*, for the plaintiffs.

*R. P. Wisner*, for the defendants.

*By the Court*, JOHNSON, J. All the personal estate of the testator, as the case shows, has been applied in payment of the legacies given by the will. The Baptist church mentioned in the will, therefore, if it can take at all, takes only the real estate. And it must be deemed to take it under and by virtue of the devise, as real estate. This church or society is a religious corporation duly organized under the act of 1813. By the revised statutes (2 R. S. 57, § 3) it is declared that "no devise to a corporation shall be valid unless such corporation be *expressly* authorized by its charter or by statute to take by devise." It is entirely clear, I think, that religious societies incorporated under the act of 1813, are not expressly, or even impliedly, authorized to take lands by devise, for any purpose whatever, where such devise is made after their incorporation. By the fourth section of the act, the trustees are authorized, upon the incorporation of the society, to take into their possession, and custody, all the temporalities, whether the same consist of real or personal estate, and whether the same shall have been given, granted, or devised, to such church, congregation or society, or to any other person for their use. They are also authorized, by their corporate name or title, to sue and be sued in all courts of law and equity, and to recover, hold and enjoy, all the property and estates belonging to such church, congregation or society, in whatever manner the same may have been acquired, or in

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whose name soever the same may have been held, as fully and amply as if the right or title thereto had been originally vested in the said trustees. This obviously relates to what shall vest in the trustees at the organization of the society, and applies only to such property as the church, congregation or society held, or owned as beneficiaries, before, and at the time of, their incorporation. It has no reference whatever to what the trustees, as such corporation, may afterwards acquire. This power is given in a subsequent clause, and is as follows: "and also to purchase and hold other real and personal estate, and to demise, lease and improve the same, for the use of such church, congregation or society, or other pious uses," but the whole is not to exceed the annual value or income of three thousand dollars. No power is given to these corporations to take and hold real estate, by devise to them, after their creation, but only by purchase. Having no power to take by devise for any purpose, the church or society in question acquired no right, but the devise, and the trust founded upon it, are entirely void, and the estate descended to the heirs at law, subject to the life estate of the widow, at the death of the testator. (*Theological Seminary of Auburn v. Childs*, 4 Paige, 419. *Ayres v. The Methodist Episcopal Church*, 3 Sand. S. C. R. 351. *King v. Rundle*, 15 Barb. 139.)

But if the devise could be supported, I am clearly of the opinion that the trust must be held void, for the reason that the object of the charity is too vague and uncertain. If it were any other than a charitable trust, it would be clearly void for the want of any certain beneficiaries who could enforce it. But it seems to be now settled that a gift to a charity, if there is a competent trustee, although there is no ascertained, or ascertainable, beneficiary, may still be upheld, provided the charitable use is so clearly and certainly defined, as to be capable of being specifically executed and enforced, as intended by the donor, by judicial decree. This seems to be the conclusion from all the late cases in this state. (*Will-*

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*iams v. Williams*, 4 *Seld.* 525. *Owen v. The Missionary Society of the M. E. Church*, 14 *N. Y. R.* 380. *Beekman v. Bonsor*, 23 *id.* 298, 310.)

By the terms of the will, the legacy, as the devise is termed, is to be kept by the church as a perpetual fund, on interest. "And the interest applied for the purpose of remunerating the services of some faithful minister of Christ, and of the Baptist order, who shall be employed by the church, as their missionary, in preaching the gospel in the destitute distant regions of the west." Although the interest of the fund is to be employed in remunerating the services of the minister to be employed as a missionary, the minister or missionary is in no respect the object of the charity, unless it be incidentally. He was intended to be a mere servant, or laborer, employed and paid to serve others, who were designed mainly to be benefited.

But where was to be the field of labor, and what race or class of people were designed to be the subjects of such missionary labor? The field designated is "the destitute distant regions of the west."

Nothing could possibly be more vague and uncertain than this. It must be in some western region or regions, and in such as were destitute and distant. I do not see how it is possible for any court, by a decree, to enforce and carry out this disposition. The field, and objects of the labor, could never be designated or directed; and if the court should undertake it, it could never be certain that it was fulfilling, in any reasonable degree, the charitable idea and disposition of the donor. He doubtless had some definite end and purpose in view, but I think he has failed to express it in his will with sufficient clearness and precision to enable the court to decree its specific execution. For this reason, also, I am of the opinion that the trust is void. There can be no doubt, as it seems to me, looking at all the provisions of the will, that the testator intended that the three legacies given in the will immediately preceding the residuary bequest, should be prin-



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cipally paid out of the real estate. That he intended they should be paid admits of no doubt whatever, although they were not to become due until the death of the testator's widow. He first gives to his wife, after the payment of funeral expenses and all honest debts, all his personal estate, of every description absolutely, except one thousand dollars due him in notes, and the interest of this one thousand dollars during her life. He also gives her the whole income of all his real estate for life, absolutely. He then gives these three legacies, amounting in the aggregate to the sum of three thousand five hundred dollars. He then gives "the whole remaining part of all my worldly property, which it is supposed will exceed three thousand dollars," to the church, in trust as above referred to.

It will be observed, that the testator knew when he executed the will that at the time these three legacies would fall due, there could be only one thousand dollars of personal property which could be applicable to their payment, as he had expressly bequeathed all his personal estate, except that sum, and disposed of the interest of that sum also, together with the income of the real estate, thus intentionally leaving the real estate only, out of which the greater portion could possibly be paid. In addition to this, the residuary bequest or devise is of *the whole remaining part*, only, showing, as I think, very plainly an intention to give only the part which should remain after the other legacies were paid and satisfied. It is conceded that an intention to charge real estate is not to be inferred simply because legacies are given in a will, and the will afterwards contains a general residuary devise of real and personal estate. There must be something more, or the intention will not be rendered sufficiently apparent, to make the legacies a charge upon the real estate, thus devised. (*Lupton v. Lupton*, 2 *John. Ch.* 614. *Tracy v. Tracy*, 15 *Barb.* 503. *Reynolds v. Reynolds*, 16 *N. Y. Rep.* 261.) There is, however, much more than that here, and I think quite enough, taking all the provisions of the will together,



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to make the intention and the charge entirely clear. This being so, the charge follows the estate in the hands of the heirs at law. For although the devise is void, the legacies are valid, and bind the land, in whosoever hands the same may come. The plaintiffs, therefore, as heirs at law, are entitled to judgment adjudging and decreeing that the said Baptist church or society took no right, title or interest in the property of the testator, by virtue of his will, but that the real estate descended, and now belongs, to the plaintiffs as heirs at law of the testator, subject to the balance due and unpaid upon the legacies to Polly Wheeler and Huldah Goddard, which is a charge upon said real estate. And also that the said defendants account to the plaintiffs, and pay over to them the rents, issues and profits of the said real estate, according to the stipulations and admissions in the case agreed upon.

[MONROE GENERAL TERM, June 2, 1862. *Johnson, Welles and Campbell*, Justices.]

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**GLASCO vs. THE NEW YORK CENTRAL RAIL ROAD  
COMPANY.**

Where a contract was made, in the city of New York, between R. and H., a person professing to act as agent for three lines of public conveyances, (including the N. Y. Central Rail Road Co.,) running in connection with each other, to transport R. and her baggage from N. Y. to Cobourg in Canada, and she received from him three tickets, one of which was for a passage over the Central rail road, and such ticket was accepted by the conductors upon the rail road, as evidence of R.'s right to ride upon the cars as a passenger; they marking it, and taking it up at or near the end of the route, in the usual manner, without demanding any fare of her; *Held* that there was sufficient proof of an undertaking on the part of the Central rail road company to transport R. and her goods over its road; and that the company's conductors, whose business it was to look to such matters, having accepted and treated R.'s ticket as sufficient, the law would presume the undertaking made by H. on behalf of the company was valid, and binding upon such company, until the contrary appeared.

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The obligation of a rail road company is to take whatever is delivered and received as baggage, from a passenger, in the baggage car of a passenger train in which the passenger takes his passage, and take it along with, and deliver it to, the passenger, at the place of destination, in the usual manner of transporting and delivering baggage.

The obligation is the same, whether the baggage is within the quantity allowed to a passenger, to be carried without any charge, other than the ordinary fare of the passenger; or whether it is an extra quantity, for which an additional charge is made.

If it be taken as the baggage of the passenger, whether ordinary or extra, it is to be carried with the passenger; unless there is some agreement to the contrary.

IN this case the proof showed, and the jury found as facts, that there were three lines of public conveyances running in connection with each other from New York to Cobourg, in Canada, viz: The People's Line of boats from New York to Albany, the New York Central R. R. Co. from Albany to Rochester, (or Charlotte, the port of Rochester,) and a line of boats from Charlotte to Cobourg, on Lake Ontario. In July, 1857, Sarah Ryan, then in New York, wife of William Ryan, the plaintiff's assignor, started for Canada, where her husband was, taking with her the goods of her husband, which were subsequently lost. She had a trunk, a bundle of bedding, and a roll of carpeting, a lot of carpenter's tools, &c. She purchased at the ticket office on the wharf at New York, of one John C. Hewitt, the agent of the People's Line, three tickets, one for the steamboat from New York to Albany, one for the Central rail road from Albany to Charlotte, and one for the lake boat from Charlotte to Cobourg. One ticket she gave up on the steamboat, before reaching Albany; one to the defendant's conductor, on the rail road, before reaching Charlotte; the third one she retained, on finding her baggage lost, and paid her money in its place. The goods were all weighed at New York, and she was charged freight on 225 pounds over what was allowed as ordinary baggage. For her passage and ordinary baggage she paid Hewitt \$4.50, and for extra freight on the 225 pounds she paid him \$3, in all \$7.50. The payment of the freight on the extra

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baggage was receipted on the ticket. When she arrived at Albany, she saw her baggage *put in the baggage car of the defendant, on the same train as that she went in.* On arriving at Rochester the goods were not delivered to her, nor at Charlotte, nor at Cobourg, nor could she find them, though she looked for them. They were never delivered to her or her husband, either at Rochester, or Charlotte, or Cobourg, although sought for by Ryan, and demanded of the rail road superintendent. The claim was duly assigned to the plaintiff, who brought this action to recover the value of the property. On the trial at the circuit the judge charged the jury, among other things, that the main question in the case was whether the defendant discharged its duty as common carrier. That the whole personal property of this woman, as well what was allowed as baggage as that upon which freight was paid, must be treated and regarded as personal baggage, and it was the duty of the defendant to carry and deliver this property with Mrs. Ryan, and at the same time. To this part of the charge the defendant's counsel excepted. That it was also the duty of the defendant to deliver this property upon the arrival of the cars at Charlotte, to Mrs. Ryan, or on board the steamboat at Charlotte, or into the custody of some person having charge of the boat, or authorized to receive baggage for the same. To this part of the charge the counsel for the defendant also excepted. That the delivery at a warehouse was not sufficient, even if made within what would be a reasonable time in respect to general freight received for transportation. That the trunk and bundles were to accompany the person, and the defendant was bound to deliver them to the person or upon the vessel with Mrs. Ryan, or in charge of some one having charge of the vessel. To this part of the charge the defendant's counsel excepted. That in the case of ordinary freight, a delivery at Charlotte within a reasonable time would be sufficient, but in this case Mrs. Ryan, as a traveler, was entitled to have this property delivered immediately upon her arrival at Charlotte, and be-

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fore the departure of the steamboat she expected to take, so that she could continue her journey in the ordinary way, and if it was not ready to be delivered to her or on board the vessel on her arrival at Charlotte so that she could continue her journey with it, that would be a failure to deliver it within a reasonable time. That a traveler is not bound to wait for his baggage beyond the period requisite to enable him to continue the journey without interruption, for such cause. To this part of the charge the defendant's counsel also excepted. The counsel for the defendant thereupon requested his honor the judge to instruct the jury as follows: 1st. That the fact of Mrs. Ryan riding on the defendant's cars, from Albany to Charlotte, on a ticket furnished by Hewitt, was not sufficient evidence of a contract between her and the defendant, by which the defendant assumed, or undertook for hire, to carry the goods in question from Albany to Charlotte. But the judge declined so to instruct or charge the jury, and the defendant's counsel excepted. 2d. That if the jury should find that the defendant undertook to transport the goods from Albany to Charlotte, and also found that they were delivered at Charlotte in the usual way of the delivery of goods for Cobourg, namely, at Holden's warehouse, within a reasonable time, the plaintiff could not recover. But the judge declined to vary his charge in the way last requested, and the defendant's counsel excepted. The jury found a verdict for the plaintiff for \$191.21; whereupon the said court ordered a stay of proceedings to enable the defendant to make a case or bill of exceptions, to be heard in the first instance at the general term.

*By the Court*, JOHNSON, J. The first point made by the defendant is, in substance, that there is no sufficient evidence to show any undertaking, on its part, to transport Mrs. Ryan and her goods from Albany to Charlotte, over its road. But I think the evidence is abundantly sufficient to prove such an undertaking. The contract was made in the city of New

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York, between Mrs. Ryan and a person professing to act as agent, to transport her and her baggage from that place to Cobourg in Canada. She paid the amount required for the transportation of herself and baggage to the place of destination, and received three tickets; one for a passage by steamboat to Albany, another for a passage over the defendant's road to Charlotte, and a third from that place to Cobourg. When she arrived at Albany her baggage was placed in the baggage car, where the baggage of passengers is usually carried, in the same train in which she took her passage in one of the passenger cars. The conductors upon the route received the ticket as evidence of her right to ride upon the cars as a passenger, marking it, and taking it up at or near the end of the route, in the usual manner, without demanding payment of any other fare by her. The defendant's agents, whose business it is to look to such matters, having accepted and treated her evidence or token of the right claimed and exercised by her, as sufficient, the law will presume the undertaking valid and binding, until the contrary appears.

The question then arises, whether the contract was broken by the defendant, so as to give a right of action to the person with whom it was made, or his assigns. This depends upon the question whether it was performed by the defendant according to its tenor and effect. That it was not so performed on the part of the defendant is, I think, rendered entirely clear by the evidence. The contract obviously was to transport Mrs. Ryan, and her baggage with her at the same time, as personal baggage. A considerable portion of the property, as appears from the evidence, was not such as would have been regarded as personal baggage, which the defendant would have been bound to transport, under an undertaking to carry the person merely. Such an undertaking implies an agreement to carry with the passenger such limited quantity of articles, for personal use, pleasure or amusement, only, as are usually carried by travelers. (*Hawkins v. Hoff-*

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*man*, 6 *Hill*, 586.) But here was an express contract. A portion was deducted as baggage which the passenger had the right to have carried in consideration of the fare paid by her for the passage of herself, and the balance was charged and paid for as extra baggage. It was not received or treated as ordinary freight, but as baggage, to be carried with the passenger, upon the same train.

The obligation of a rail road company undoubtedly is to take whatever is delivered and received as baggage from a passenger, in the baggage car of a passenger train in which the passenger takes his passage, and take it along with and deliver it to the passenger at the place of destination, in the usual manner of transporting and delivering baggage. And in this respect the obligation is the same, whether the baggage is within the quantity allowed to a passenger to be carried without any charge, other than the ordinary fare of the passenger, or whether it is an extra quantity, for which an additional charge is made. If it is taken as the baggage of the passenger, whether ordinary or extra, it is to be carried with the passenger, unless there is some agreement to the contrary. Any other rule would be productive of great inconvenience and hardship, if not loss, and would subject travelers, often, to intolerable delays and annoyances. The judge was right, therefore, at the circuit, in charging the jury that the property in question, under the circumstances of the case, was to be regarded and treated as personal baggage.

It is abundantly established by the evidence that the defendant did not take the baggage to the place of destination on its line, with the passenger, and that it had not been found, or delivered or offered, by the defendant, at the time of the commencement of this action, which was about two weeks after the passage. A right of action had therefore, undoubtedly, accrued when this action was commenced. No question was raised upon the trial, nor upon the argument,

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in respect to the measure of damages which the plaintiff was entitled to recover.

The judge very properly refused to charge the jury, as requested by the defendant's counsel in his second proposition. There was no evidence on which any such charge could be based. It having been made clearly to appear that the property did not arrive with the passenger, and could not be found, although inquired after and searched for, and that it could not be found several days afterward, and there being no pretense that it had ever been delivered or offered to the owner, or any notice given of its having been subsequently discovered, there was nothing upon that subject which could have been properly submitted to the jury. The only evidence which the defendant gave, was that some goods of a similar description were seen in the warehouse at Charlotte in the following November. The goods were taken by the defendant about the middle of July, and no evidence of their having been seen by any one after that time, until November following. Most certainly, upon this evidence, the jury would not have been warranted in finding that the property had been delivered at Charlotte in the usual way, and within the proper time. There was, I think, no error in the charge, or in the refusal to charge as requested; and a new trial must be denied.

[MONROE GENERAL TERM, June 2, 1862. *Johnson, Welles and Campbell, Justices.*]

36	564
57h	354

36	564
125a	91

36	564
83h	425

**MATHER vs. CRAWFORD, Commissioner of Highways of the town of Rathbone.**

A commissioner of highways has no power or authority to bind a town, except such as is expressly conferred by statute, or such as is necessarily implied from the power expressly conferred.

The statute nowhere, either expressly or impliedly, authorizes such commissioner to pledge the credit of the town, in any manner.

A commissioner who enters into a contract with an individual for work, either upon highways or bridges, when no means have been provided by the town, may incur a personal liability, but cannot impose any liability upon his successor in office, or upon the town.

The principle of estoppel does not apply to the unauthorized acts of a predecessor in office, when the action is to charge the successor in his official capacity.

Commissioners of highways have the implied power to construct new bridges; especially such bridges as it is the duty of towns to make and keep in repair.

But in no case have commissioners any power or authority to construct bridges, at the expense of the town, or of the county, unless they are connected with, and form a part of, an existing highway.

**T**HE action was brought to recover for services rendered, in building or repairing a bridge in the town of Rathbone, in the county of Steuben. The pleadings admit, and the proof shows, that Lucius Parker was, from May, 1856, until after January, 1858, sole commissioner of highways of the town of Rathbone. That Harrison Van Scoy was his successor, and was sole commissioner of said town at the time of the commencement of this action. The action was originally commenced against Van Scoy, and he having been succeeded in office by Lewis D. Crawford, the latter was, after the trial, substituted in his place as defendant. In 1857 the plaintiff built a bridge across the Canisteo river, in said town, at the request of Parker, as such commissioner, at the agreed price of one hundred dollars. The bridge, after being finished, was accepted by said Parker, as commissioner, and had since been used by the public as part of the highway. It appeared that a bridge had formerly stood where this was built. That the superstructure went off by a freshet, and the work by the plaintiff was replacing a superstructure upon the same piles



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and abutments, and for which no pay had been received by him. Parker gave his order to the plaintiff on the town collector for one hundred dollars, June 30, 1850, which the plaintiff presented to the collector for payment. It was not paid. It did not appear by the proof that the bridge in question was built on a public highway, or that the river intersected a public highway at that place.

The action was tried at the Steuben circuit, in April, 1861, before Justice KNOX and a jury. The plaintiff had a verdict. Several exceptions were taken, on the trial, which were ordered to be heard, in the first instance, at a general term.

*F. C. Dininny*, for the plaintiff.

*Geo. B. Bradley*, for the defendant.

*By the Court*, JOHNSON, J. The action is brought against the successor in office of the commissioner with whom the contract to build the bridge in question was made, and whether the action can be maintained or not depends entirely upon the question whether the contract was within the scope of the authority of the predecessor, as commissioner of highways, and was binding upon the town, of which he was at the time such commissioner. (2 R. S. 474, § 98.) If it was, the action is maintainable against the defendant, and the judgment, when recovered, is to be collected of him personally, and the amount allowed to him in his official account against the town. (2 *id.* 476, § 108.) A commissioner of highways has no power or authority to bind a town, except such as is expressly conferred by statute, or such as is necessarily implied from the power expressly conferred. The statute nowhere, either expressly or impliedly, authorizes such commissioner to pledge the credit of a town, in any manner. He is made the agent of the town to expend, in the care and superintendence of the highways and bridges thereof, such moneys as have been raised by the town in pur-

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suance of the statute for those objects, or such as may come to his hands from other sources, for such purposes, but he is no agent and has no authority to create a debt against his town by any contract he can make. This was expressly held in the case of *Barker v. Loomis*, (6 Hill, 463.) In that case money had been borrowed by the commissioners of highways, and expended upon the highways and bridges. At a subsequent annual town meeting of the town, a vote was taken on a proposition to raise the amount to meet the loan. The proposition was opposed on the ground that the commissioners had no power to create the debt, and was rejected by the voters. The action was brought against the successors in office, upon the obligation given by the then commissioners, for the money borrowed, and it was held that no legal obligation had been created against the town, and consequently no action would lie against the successors in office. It is quite obvious that a commissioner has no more power to create a debt against a town, by contracting directly for work and labor, and materials to be found, than he has by borrowing money to pay for such work, labor and materials. The power in either case is the same, precisely. It is an attempt to charge the town, beyond the means it has consented to provide for such purposes ; or in the absence of any such provision, and unless it is within the scope of the commissioner's authority, it is not a contract "by or in behalf of" the town ; and the action will not lie upon it against the successor in office.

Highway commissioners can compel their town to raise the sum of two hundred and fifty dollars, in any one year, for the purpose of making improvements upon roads and bridges, by making a statement of the improvements necessary to be made thereon, and an estimate of the probable expense of making such improvements, beyond what the labor to be assessed for that year will accomplish. (1 R. S. 502, § 3.) This statement and estimate are to be delivered to the supervisor of the town, who is to lay it before the board of super-

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visors at their next annual meeting. The board of supervisors is to cause the amount so estimated, to be assessed, levied and collected in such town, but the amount in any one year, upon any such estimate, is not to exceed the sum of two hundred and fifty dollars. (*Id.* § 4.) This is the only manner in which highway commissioners can, by their own exclusive act or volition, impose any burthen or charge upon their town. If the commissioners are of opinion that the sum of two hundred and fifty dollars will prove insufficient to make the necessary improvements, they may apply in open town meeting for a vote authorizing an additional sum to be raised for that purpose, not exceeding \$750. (*Id.* § 5.) This additional sum the electors may by vote authorize to be raised; but before the application can be made, notice of the intended application is to be posted by the commissioners, in at least five of the most public places in town, at least four weeks next preceding the annual town meeting. (1 R. S. 341, §§ 10, 11, 13.)

By referring to these sections, it will be seen that this additional sum may be authorized by the electors to be raised, to pay any balance which may be due, for improvements already made, as well as to be expended in new improvements. The plaintiff's counsel contends that the unavoidable inference from this is that the commissioners may create a valid debt against the town by their contracts, for improvements and repairs, without reference to the amount which may be raised at their instance in the manner prescribed. But this does not follow. It is simply the mode prescribed by statute for raising funds, for the purpose of liquidating claims, for expenses incurred in making repairs or improvements, beyond the funds provided by the town. Power is given to the electors to provide means for the payment of such claims, which it is to be presumed they will always properly and equitably exercise, but which they cannot be compelled to exercise at the instance of the claimant, in case they refuse. The whole scheme and policy of the statute, as it seems to me, evidently

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is to invest the commissioners with power to expend all moneys raised for such objects in the mode prescribed, in the repairs and improvement of highways and bridges in such manner as shall seem to them most judicious, but to confer upon them no power to bind the town by contract, beyond, or independent of, such appropriation. A single exception to this is to be found in *Sess. Laws of 1858, ch. 103, §§ 1, 2 and 3*, where roads or bridges have been damaged, or destroyed, after any town meeting shall have been held, or when it is too late to give the prescribed notice. But in such case it can be done only by and with the consent of the board of town auditors of the town, and then the audited account constitutes the obligation against the town. It is manifest that no powers were intended to be given, except such as were necessary to enable the officer to perform the duties imposed ; and it has been very frequently, and quite uniformly, held, that such officers were under no obligation, or duty, to make repairs or improvements, either upon highways or bridges, beyond the means raised and placed in their hands for that purpose. (*Bartlett v. Crozier*, 17 *John*. 452. *The People v. Commissioners of Highways of Hudson*, 7 *Wend*. 474. *The People v. Adsit*, 2 *Hill*, 619. *Morey v. The Town of Newfane*, 8 *Barb*. 645.) Unless this is so, towns are completely at the mercy of these officers, and may be involved to any extent, at their discretion, and all the restrictions and limitations of the statute, upon them, and upon the electors at town meetings, and upon boards of supervisors, in respect to the amount of assessments in any one year, apparently designed for the protection of towns against exorbitant and oppressive burthens, will be rendered of no avail. A commissioner who enters into a contract for work, either upon highways or bridges, where no means have been provided by the town, may incur a personal liability, but cannot impose any liability upon his successor in office, or upon the town. A successor in office, as it seems to me, without funds in his hands, or funds provided which are to come into his hands,

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can no more be made liable upon his predecessor's contracts, than he could have been for refusing to do the work in the first instance, under the same circumstances. It was for the plaintiff to show, affirmatively, such a contract as would bind the defendant as a successor in office.

Most clearly the principle of estoppel does not apply to the unauthorized acts of a predecessor in office, where the action is to charge the successor in his official capacity.

It is claimed, on the part of the defendant, that highway commissioners have no power or authority conferred upon them, by statute, to build new bridges, where none have before been built; but that, on the contrary, all their power is confined to the repair and superintendence of those already in existence. It is true that the statute does not, in direct and express terms, make it the duty of the highway commissioners to construct new bridges, but I think it does so by unavoidable implication; especially as to all bridges which it is the duty of towns to make and keep in repair. Such bridges are simply parts of the highways of the town, and are absolutely necessary in order to render highways at all times passable with convenience and safety. They are intrusted with the general care and superintendence of all highways and bridges in their respective towns, and are required to keep in repair such as are or may be erected over streams intersecting highways. No provision is made for their construction, otherwise, except such as are constructed with funds raised at the expense of the county, and even then the money when collected is to be paid over to the commissioners of highways of the town in which it is to be expended. I have no doubt, therefore, that the power to build new bridges is vested in the commissioners of highways. Within the means provided by the town, they may do whatever is necessary to render the highways safe and convenient for the public to pass over.

But in no case have commissioners any power or authority to construct bridges, at the expense of the town or the coun-

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ty, unless they are connected with, and form part of, an existing highway. They are required to keep such bridges in repair as are built over streams intersecting highways, and no others. (1 *R. S.* 501, § 1, *sub.* 4.) As to any other bridge, their acts and contracts are no more binding upon the town, or the successors in office, than those of any private person. A bridge not connected with a public highway, and forming no part of it, would be mere private property, in which the public would have no interest whatever, and which they could not use for any purpose, without the permission, express or implied, of the owner of the land. It would have been a good defense, therefore, for the defendant to have proved, as he offered to do, that the bridge in question was not built upon, or in connection with, a public highway. That fact, alone, would have shown conclusively that the contract was not within the scope of the authority of the commissioner, even should it be held valid in other respects. The exclusion of that evidence was therefore erroneous.

It may be that, in equity, the town ought to raise this money, and pay the amount claimed by the plaintiff; and if they ought, it is to be presumed the electors will by vote authorize it to be raised, when properly applied to.

But the question here is, whether the commissioner can legally, of his own mere volition, create a debt against the town, and thus force a burthen upon it, without any previous statement and estimate, or any application in open town meeting, and vote of the electors, as required by statute. It seems to me very clear that he cannot. I am of the opinion, therefore, that a new trial must be granted, on both grounds.

[MONROE GENERAL TERM, June 2, 1862. *Johnson, Welles and Smith, Justices.*]

SMITH and others *vs.* BRACKETT.

The exemption of property under the act relative to homestead exemptions is a mere personal privilege, which the statute secures to the debtor, and to his widow and children after his decease, which does not run with the land, and which cannot be transferred to another with the land.

The statute does not exempt the property from becoming *bound* and charged by a *judgment*, but from a *sale* on execution, only, so long as the exemption shall continue in force.

A full and explicit waiver of the exemption will determine the exemption, to all intents and purposes, and leave the property liable to be sold on any execution issued upon the judgment, the same as though no such exemption had ever existed. It will remove the only obstacle to the complete enforcement of the lien and charge created by the judgment.

A judgment against the owner of the homestead will have priority over a mortgage subsequently executed by him, as a lien upon the premises.

THIS was a controversy submitted, without action, for the decision of the court, under section 372 of the code of procedure. On the 1st day of September, 1857, Patrick Burns filed in the office of the clerk of Livingston county, a notice under the act of April 10, 1850, entitled "An act to exempt from sale on execution the homestead of a householder having a family," stating that he designed certain premises therein described to be held as a homestead; that the value of the premises did not exceed \$1000; and they were occupied by Burns as a residence, he being a householder and having a family. In August, 1858, the plaintiffs, as copartners, were creditors of the said Patrick Burns, in the sum of \$923.84, for payment of which they held certain personal property as collateral security, but not sufficient to pay the debt in full. The claim was sent to Messrs. Ward & Colt, of Geneseo, attorneys, for prosecution, and Burns notified thereof. It was agreed between Burns and wife, and Messrs. Ward & Colt, as such attorneys, that Burns with his wife should execute a mortgage upon said real estate for the sum of \$787.16, as security for the payment of the same, and at the same time he represented to Ward & Colt that there were no judgments against him, and that the personal property

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aforesaid should be given up to said Burns, and all personal claim against him discharged, and the plaintiffs rely on said mortgage for the collection of their debt. On the 18th day of January, 1859, the defendant Brackett recovered a judgment in said court against Burns for \$170.21, for a debt contracted after 1850, and not within the exception of section 2 of the act aforesaid, which judgment was, on the 18th day of January, docketed in Livingston county. On the 1st day of April, 1859, in pursuance of this arrangement, the mortgage was executed, and on the same day acknowledged by Burns and wife, and delivered to Ward & Colt, as agents for the plaintiffs, as such copartners, and received by them in payment and satisfaction of the debt aforesaid, and the personal property given up by them to Burns, with the approbation and consent of the plaintiffs. On the same day, and at the request of Messrs. Ward & Colt, in behalf of said plaintiffs, Burns executed a written instrument to the effect that he waived the said exemption act, in regard to the above described property, and delivered it to them. This release was afterwards by them recorded in Livingston county clerk's office on the 2d day of April, 1859. The question to be determined was whether the judgment in favor of the defendant, James Brackett, or the mortgage executed to the plaintiffs, Smith, Perkins & Co., was entitled to preference as a lien upon said real estate.

*Danforth & Terry*, for the plaintiffs.

*Benedict & Martindale*, for the defendant.

*By the Court*, JOHNSON, J. The statute (2 R. S. 359, § 3) provides that all judgments hereafter rendered in any court of record shall bind and be a charge upon the lands, tenements, real estate and chattels real of every person against whom any such judgment shall be rendered, which such person may have at the time of docketing such judgment, or



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which such person shall acquire at any time thereafter; and such real estate and chattels real shall be subject to be sold upon execution to be issued upon such judgment.

By the act of 1850, (*Sess. Laws of 1850, ch. 260, § 1,*) it is provided that, "in addition to the property now exempt by law from sale under execution, there shall be exempt by law from sale on execution for debts hereafter contracted, the lot and buildings thereon, occupied as a residence, and owned by the debtor, being a householder and having a family, to the value of one thousand dollars."

Before the defendant's judgment was docketed, the debtor had filed the requisite notice to exempt his real property from sale on execution. The judgment was docketed on the 18th of January, 1859, and the plaintiffs' mortgage was executed and delivered by the judgment debtor on the 1st day of April, 1859. On the same day that the mortgage was executed and delivered, the debtor, by a written instrument, in pursuance of the statute, waived all the benefits of the same, which he had secured by the filing of his previous notice. It is insisted on behalf of the plaintiffs that the defendant's judgment never bound, or became a charge upon, the premises of the judgment debtor; or if it did, it was subject to the prior incumbrance of their mortgage.

The exemption, it will be seen, is from sale on execution only, and does not exempt the property from being bound and charged by the judgment. It seems to me, therefore, that within the very terms of the statute the defendant's judgment bound and became a charge upon the premises in question the moment it was docketed, which charge, however, could not be enforced by execution until the waiver was executed and acknowledged. This waiver, being full and explicit, determines the exemption, to all intents and purposes, and leaves the property liable to be sold on any execution which may be issued upon the judgment, the same as though no such exemption had ever existed. It removes the only obstacle to the complete enforcement of the lien and

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charge created by the judgment. This exemption would also cease and determine, undoubtedly, as it seems to me, without any waiver, whenever the owner who had secured it in his favor should cease to occupy it as a residence, or to own it, during his life. The statute only applies to property thus occupied, which is owned by the debtor. The exemption is a mere personal privilege, which the statute secures to the debtor, and to his widow and children after his decease, which does not run with the land, and which cannot be transferred to another, with the land. The object of the statute seems to have been to secure a habitation to families, rather from motives of public policy than the protection of the debtor's property against the claims of his creditors. And hence it did not exempt the property from becoming bound and charged by a judgment, but from sale on execution only, so long as the exemption should continue in force. The case of *Allen v. Cook*, (26 Barb. 374,) which was, I think, correctly decided, is conclusive upon this question. The judgment, therefore, has priority over the mortgage as a lien upon the premises, and must be first satisfied.

Judgment accordingly.

[MONROE GENERAL TERM, June 2, 1862. Welles, Smith and Johnson, Justices.]

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HARRIS vs. HARRIS.

[This case is reported ante, p. 88. The following opinion, of one of the members of the court, not having been received in time to be printed in its proper place, is inserted here.]

GOULD, J. It would seem that the point first to be passed upon by us is whether the decision and judgment, in the previous proceedings in this court, on the application of said Ephraim Harris and others for the probate of the will of

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John Harris as a will lost or destroyed, are of such a nature that the existence or non-existence of a valid will of said John Harris is thereby *finally adjudicated*, as far as the parties to that proceeding are concerned. For if that point is so adjudicated as to be conclusive on these defendants, there is no occasion now to investigate the merits of the case. That proceeding was under the provisions of the revised statutes, (3 R. S., art. 3d, chap. 6, part 2d, 5th ed., p. 153, §§ 86 to 90,) which authorize such a proceeding in this court, for the purpose of attaining the same general results, (as to recording by the surrogate, and his issuing thereon letters testamentary or of administration,) as to a lost will, as are attained by the ordinary probate of a will not lost, and the authority extends, as to wills of persons dying *before* the passage of that act, to allowing the court to be satisfied with and order probate upon such evidence as might sufficiently show the making, execution, contents and loss or destruction of the will; while as to will of persons dying *after* that act took effect, the precise tenor of the proof, and by *what evidence* a lost will could be established so as to admit it to probate, are prescribed. Yet sections 86 and 87, which cover the establishing of the will and the recording of it, apply to *both* classes of cases; that is, as well to those where common law evidence is sufficient, as to those which require the application of the strict provisions of section 90.

There would seem, construing all these sections together, no reason for saying that probate made before this court under those sections, has any power or effect, other than has the probate before a surrogate of a will not lost. And there is no pretense that the latter probate is, as to any interest in real estate, conclusive upon any party. If this be so—if the decision of this court *admitting* this will to probate as a lost will would not have been conclusive *in favor* of Ephraim Harris—there can surely be no pretense that a decision *refusing* to admit it to probate can be conclusive *against* him; especially when that refusal is accompanied by an express

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finding that *in fact* there was such a will, duly executed, and valid at the testator's death, and that it had been destroyed after such death, fraudulently; and when the refusal is placed expressly and solely on the want of the *statute* evidence required for allowing the probate.

This conclusion leaves us at liberty to look into the merits of the case, and the several findings of the judge who tried the cause; and as those findings are very fully and clearly set forth by him, and there is abundant evidence to support his findings, it would here be superfluous to repeat either his reasoning or his findings, or the conclusions of law which are properly drawn from them.

As to the exceptions taken to the admission of some matters of evidence, there is abundant evidence to support the decision, without what was possibly objectionable; and when that is the case, there should be no reversal.

On the whole, the judgment of the circuit should be *affirmed*.

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THE WAYNE AND ONTARIO COLLEGIATE INSTITUTE *vs.*  
DANIEL SMITH.

The defendant, with ~~others~~, made his subscription to raise an amount sufficient to induce a religious association to establish and found a collegiate institute, to be located at N., where he resided; which subscription was also used to induce the regents of the university to grant a charter for such institution. The institution being incorporated, the defendant acted as one of the trustees, and paid two installments upon his subscription, to enable the officers to proceed with the erection of the collegiate buildings. He did not refuse to act as trustee, or to pay upon his subscription, until after contracts had been made, and measures had been taken to erect the buildings, and large expenses for that purpose incurred. *Held* that the defendant must be deemed to have requested the corporation to proceed with the erection of the buildings described in the subscription paper, and to have ratified and affirmed his subscription, and the acts of the trustees in incurring expense towards the erection of the college edifice.

Where the subscribers to a paper severally agreed well and truly to pay the

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several sums set opposite to their respective names, to the treasurer of a board of trustees to be thereafter elected, said money to be expended in the erection of an institution of learning, to be built of brick, at least three stories high, and capable of accommodating 500 pupils, &c. and to be located at N.; *Held* that each subscription should be regarded as a conditional promise or proposition to pay the sum subscribed, towards the expense of erecting an institution of learning in the manner, and upon the terms, and of the description specified in the paper, which promise became binding upon each subscriber when accepted, adopted and acted upon by the corporation.

After the corporation has proceeded, upon the faith of the engagement contained in such a paper, to make contracts and incur liabilities for the erection of buildings, the proposition of the subscription paper should be deemed accepted, and the liability of the subscribers fixed.

Such subscriptions can be sustained, upon the principle that gratuitous promises or propositions to pay money upon condition, or upon the happening of some event, or the doing of some act, or incurring some expense, loss or legal obligation, become binding as legal and valid contracts, upon acceptance and performance of the stipulated condition.

**A**PPEAL from a judgment of the Wayne county court, reversing a judgment of a justice of the peace. In May, 1855, the defendant and several other persons signed the following paper:

“We, the subscribers, do agree to well and truly pay the several sums set against our respective names, to the treasurer of a board of trustees, (which may be elected by the Wayne County Baptist Association, at a convention now called to meet at Marion, on Wednesday, the 30th day of the present month,) in such installments, (provided always that no more than one fourth is called for at any one time,) and at such times as shall be demanded, under the following provisions, viz: said moneys shall be expended in the erection of an institution of learning, and no other purpose; said institution shall be built of brick, at least three stories high, and capable of accommodating five hundred pupils; said building shall be of a modern style of architecture, well and thoroughly furnished, the grounds inclosed in a neat fence, laid out with gravel walks and planted with shrubbery; the course of instruction shall be equal to the first three years

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of a college course, open to both males and females, of all denominations; said institution shall be furnished with an extensive library, philosophical and chemical apparatus sufficient for illustrating all the branches therein taught; said institution shall be located in Newark, east of the west line of the old corporation of Arcadia. It shall be the duty of said Baptist denomination to keep said institution in operation continually, and provided they should fail for a longer period than one year in so doing, for want of interest therein, then such buildings, or at least such portion of their value as shall have been paid by the citizens of Newark, shall revert to them, and they shall ever after control them by their trustees, provided always a school is sustained by them; but in case provided said Baptist denomination do well and truly carry on said school, as above set forth, then our subscription shall be to them donations, to be forever after held by them, without any reservation or interest therein, whatever.

Arcadia, May 23, 1855."

To this paper the defendant subscribed \$100.

On the 6th of July, 1855, an application of sundry inhabitants of Newark was presented to the regents of the university of the state for a charter of incorporation, in which application it was stated that subscriptions for the endowment of an academy in that place to the amount of \$10,500 had been received, of which ten per cent had been paid in, &c. A copy of the subscriptions was annexed to the application, being the subscriptions which had then been made to the paper aforesaid, including the subscription of the defendant. A charter was granted by the regents, by the name of "Wayne Co. Collegiate Institute." The name was subsequently changed by the regents, to the "Wayne and Ontario Collegiate Institute." This action was brought in a justice's court to recover the amount of two installments of \$15 and \$10, of the defendant's subscription, with interest. At the trial, evidence was given by the plaintiff, tending to prove that there was a meeting of the Wayne County Baptist

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Association, at Marion, on the 30th of May, 1855; that the meeting adjourned to meet at Palmyra; and that the meeting at Palmyra adjourned to and was held at Macedon, in June, 1855. No trustees were elected by the said association at Marion. The meeting at Palmyra fixed the location of an institution of learning; and there was testimony that the meeting at Macedon elected fifteen trustees, of which the defendant was one. It was proved by the plaintiffs that they made calls for installments of the subscriptions; that two installments of \$15 and \$10 were collected of the defendant by collectors of the plaintiffs, and that he was applied to by a collector for an installment of \$15, and written to by the collector for another installment of \$10, neither of which had been paid. The plaintiffs further proved that they entered upon erecting a building, in September or October, 1855, to be three stories high and basement, and sufficient to accommodate 500 or 600 pupils; that they stopped the work in December of that year on account of frost, and have not done any thing since, "on account of funds."

There was no evidence given that the plaintiff had incurred any indebtedness or liability on the faith of the subscriptions, beyond the installments paid and collected thereon. The only evidence on that subject was, that a building committee was appointed to contract for the materials and the work; that it was stated it was the object of a meeting of the trustees, October 18, 1856, to make some arrangements to pay Mr. Parkhurst, for which purpose it was proposed to assign the balance due on the twenty-five per cent subscriptions; that at a meeting of the trustees, June 13, 1857, the president and secretary were authorized to assign to William Parkhurst two justices' judgments in favor of the plaintiff; that the trustees, at the meeting last aforesaid, adopted a report to the regents, of the condition and prospects of the plaintiff.

At the close of the plaintiff's proofs, the counsel for the defendant moved for a nonsuit, on the following grounds:

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"1. The plaintiff has not established facts sufficient to entitle it to recover. 2. That the subscription proved is conditional and void, on grounds of public policy. 3. That the evidence shows that the plaintiff, previous to this suit being commenced, abandoned the enterprise of building the institution subscribed for. 4. That the plaintiff has not shown itself to be the owner of the subscription. 5. That the subscription is void as being without consideration or mutuality. 6. That the evidence shows a forfeiture of the charter of the institution. 7. That the subscription contains obligations and rights which are unequal in regard to the several subscriptions."

The justice granted the motion. On appeal by the plaintiff to the county court the judgment of the justice was reversed, and the defendant appealed to this court.

*T. R. Strong*, for the appellant.

*G. H. Arnold*, for the respondent.

*By the Court*, E. DARWIN SMITH, J. The decision of the county court in this case, reversing that of the justice, I think, was right, and is sustainable, within the cases of *Barnes v. Perrine*, (9 Barb. 210; S. C., 15 id. 249, and 2 Kern. 18;) *McAuley v. Billenger*, (20 John. 89;) *Farmington Academy v. Allen*, (14 Mass. Rep. 172;) *Amherst Academy v. Cowles*, (6 Pick. 427;) and *Religious Society of Whitestown v. Stone*, (7 John. 113.) The defendant, with others, made his subscription to raise an amount sufficient to induce the Wayne county Baptist association to establish and found a collegiate institute, to be located in his own village, at Newark, in said county; which subscription was also used to induce the board of regents to grant a charter for such institution, in which charter the defendant was named as one of the trustees of said corporation. The in-



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stitution being incorporated, in pursuance of such application, the defendant acted as one of the trustees, and paid two installments upon his subscription, to the collector appointed by the trustees, to enable the plaintiff to go on with the erection of the collegiate buildings, and did not refuse to act as trustee, or to pay upon his subscription, until after contracts had been made, and proceedings had been taken, to erect the buildings, and large expenses for that purpose incurred. Upon these facts, I think he must be deemed to have requested the corporation to proceed with the erection of the buildings described in the subscription paper, and to have sanctioned and affirmed his subscription and the acts of the trustees in incurring expense towards the erection of the college edifice. So far as liabilities were assumed, or expenses incurred, by the plaintiff before the defendant repudiated his subscription, no doubt can, I think, be entertained that he must be liable to pay his proportionate share of such liabilities and expenses, on the ground that they were incurred at his request. But if his obligation is fulfilled when such liabilities are discharged and expenses paid, the college edifice which the plaintiff was engaged in erecting must remain unfinished, unless contracts were previously made to complete the whole work, and the whole enterprise of founding and establishing a noble institution of learning, according to the plan of the original subscription, must probably be entirely abandoned; for if the obligation assumed in the subscription papers is binding upon the defendant only to the extent of liability and expense incurred before its repudiation, most of the residue of the subscription will probably not be paid. This action, I presume, is a pioneer suit, to ascertain by the decision of this court whether the original subscription is valid. For it appears that about contemporaneously with the refusal of the defendant to make further payments upon his subscription, the work of erecting the college edifice was suspended. In the case of *Barnes v. Perrine* the church had been erected, when the suit was brought;

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and the trustees had taken down the old church, and erected a new one in its place, on the faith of the subscription, at a cost of more than \$6000. And in the case of the *Trustees of Farmington Academy v. Allen*, the trustees of the academy, on the faith of the funds raised by the subscription, had proceeded to erect a building for the use of the institution. In both these cases the whole work could properly be claimed to have been performed for the defendants, respectively, and they were liable therefor, as for money paid or expended at their request. But upon this ground, the liability to pay upon the subscription must cease with the request; and such request could not be implied, after an express refusal to make further payments, and a distinct repudiation of the subscription. Regarding the liability upon such subscription paper as based upon an extrinsic request outside of the subscription paper itself—though a correct assumption, as far as it goes—it seems to me this is placing the principle upon which the liability rests, on too narrow ground.

I think it is to be regretted that the more liberal ground suggested by Chancellor Walworth in *Hamilton College v. Stewart* (2 Denio, 416) of mutual promises; or the ground suggested by Chief Justice Nelson, in the same case, (*Id.* 408,) was not sustained by the court of appeals, in that case. (1 N. Y. Rep. 582.) I am by no means satisfied that in this country, where all our religious, educational and charitable institutions are founded by voluntary associations, and dependent upon private liberality, the personal benefit to be derived from the erection of a church edifice for worship by himself and family, or the erection of an academy or other institution of learning in his immediate neighborhood, for the education of his children, are not works involving a sufficiency of private interest to every citizen, and of pecuniary benefit, to maintain a promise expressly and distinctly made, received and acted upon in the erection of buildings for such purposes. But the view is clearly repudiated, in most of the

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cases, and it is perhaps too late to say that it is a view of the question altogether too narrow for this great continent, over which civilization, law and religious and educational institutions are to be spread and maintained purely upon the voluntary principle.

But I think the subscription in this case, and this class of subscriptions generally, can be based upon another ground, which to me seems impregnable. I think the subscription here should be regarded as a conditional promise or proposition to pay to the plaintiff the sum of \$100 towards the expense of erecting an institution of learning in the manner, and upon the terms, and of the description specified in the subscription paper signed by the defendant and others, in question in this action. The subscribers to that paper do therein severally agree well and truly to pay the several sums set opposite their respective names, to the treasurer of a board of trustees; "said money to be expended in the erection of an institution of learning, to be built of brick, at least three stories high, and capable of accommodating 500 pupils," &c., and "located at Newark." This subscription paper, I think, means and is, in substance and legal effect, the same as though it read as follows: "We the subscribers severally agree with the Wayne and Ontario Collegiate Institute, that in consideration that the said corporation will proceed to erect a building for an institution of learning, at Newark in the county of Wayne, capable of accommodating 500 pupils, in manner and style as herein particularly specified, we will pay to such institution the sum set opposite our respective names; provided that not more than one fourth is called for in one year's time." This is, in substance, the proposition of the defendant as one of the subscribers to these papers. It is a conditional bargain or agreement on his part, binding when accepted, adopted and acted upon by the plaintiff.

Gratuitous promises or propositions to pay money upon condition, or upon the happening of some event, or the doing

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of some act, or incurring some expense, loss or legal obligation, become binding as legal and valid contracts upon acceptance and performance of the stipulated condition. (*Story on Cont.* 453. 12 *Mass. Rep.* 140. 14 *id.* 172, 176. 5 *Pick.* 384. 6 *id.* 433. 12 *id.* 129. *L'Amoureux v. Gould*, 7 *N. Y. Rep.* 349. *Hilton v. Southwick*, 17 *Maine Rep.* 303.) Upon this principle all difficulty in regard to this class of subscriptions seems to me obviated, and a recovery upon them can be had without resorting to the questionable expedient of patching up a contract by extrinsic parol evidence, from which to help out the subscription paper by the implication of a promise. The object of the subscription is expressed in the paper itself. The terms upon which the defendant agrees to pay are therein specified. When these terms are complied with, or engagements and liabilities incurred on the faith thereof, a complete contract is made, and the liability of the defendant has become absolute. Upon the faith of the engagement contained in the subscription paper signed by the defendant, the plaintiffs were, in my opinion, entitled to go on and make contracts, and incur liabilities, for the erection of the college edifice. And when they had proceeded to do so in good faith, the proposition of the subscription paper should be deemed accepted, and the liability of all the subscribers to such paper fixed, and they, and each and every of them, should be held thereafter legally bound to pay their and his subscription, in manner and form as specified in the said proposition or subscription by them signed respectively.

The judgment should be affirmed.

[MONROE GENERAL TERM, December 2, 1861. *Welles, Smith and Johnson*, Justices.]

## HALL vs. EARNEST and HAZELETT.

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A promissory note, to be the subject of sale, must be an existing valid note in the hands of the payee, and given for some actual consideration, so that it can be enforced between the original parties.

A note not valid in the hands of the payee cannot by him be rendered valid by a sale thereof to a bona fide purchaser at a rate of interest exceeding seven per cent. To be the subject of sale, it must have a pre-existing validity. Its breath of life cannot be imparted through a usurious transaction.

The security given to the maker of an accommodation note can have no greater validity than the note itself, and cannot render valid an obligation tainted with usury.

An accommodation note, having in fact, as against the maker, no validity, and never having had any legal inception, is incapable of sale; and one who buys it of the payee takes the precise place of the payee, in respect to the defense of usury, although he purchased the paper in ignorance of its true character, and upon the false representation that it was business paper, and given for value.

If a note is made only for the accommodation of the payee, to enable him to raise money on it, and is sold by him to a third person, for a less amount than upon its face purports to be due thereon, so as to secure to the purchaser a greater rate than seven per cent for the use of his money, the transaction is usurious, and the note is void; whether the purchaser knew, at the time he purchased it, that it was so made, or not.

Turning out a bond and mortgage, to the maker of an accommodation note, merely as collateral security, to be available to him only in case the payee fails to pay the note, will not furnish a valid consideration for the note, or render the same available in the hands of a purchaser to whom it is transferred upon a usurious consideration.

After evidence has been duly taken, bearing upon the issues, on a trial, without objection, the judge at the circuit has no power to strike it out, or to exclude it from the consideration of the jury.

**T**HIS action was brought to recover the balance due upon a promissory note made by the defendants. The defenses relied upon were usury, and that the holder extended the time of payment to the injury of the defendant.

The cause was tried at the Steuben circuit on the 11th day of January, 1859, before the Hon. T. A. JOHNSON and a jury. The defendants on that trial recovered a verdict. The plaintiff moved for a new trial, at a special term, before the same justice, which motion was denied. The plaintiff then appealed to the general term. The facts are as follows: On

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the 14th day of March, 1855, one John Earnest, the father of the defendant John J. Earnest, executed his bond and mortgage to his son George W Earnest, for the sum of \$650, bearing interest from the first day of April, 1855, for the purpose of raising that sum of money. Failing to raise the money upon the bond and mortgage, he applied to his son John J. Earnest, one of the defendants, to give him his note and take the bond and mortgage. To this John J. Earnest agreed, and the defendant Hazelett agreed to sign the note as surety for the other defendant. About the first of June, 1855, in pursuance of that agreement, the defendants made their promissory note for \$650, and dated it back to the time the mortgage began to draw interest, payable to John Earnest, the father of one of the defendants, or bearer, and delivered it to the payee, who at the same time delivered the bond and mortgage to the defendant John J. Earnest, with the promise to have it assigned to him when the grantee in the mortgage came out from Allegany county, where he resided. The grantee came out about the first day of July, 1855, and executed the assignment of the bond and mortgage, and acknowledged the same before a justice of the peace. John Earnest, on the 8th or 9th of June, 1855, sold the note to one Kingsley for \$605, at the same time representing it to be given for a valid and valuable consideration. The defendant John J. Earnest afterwards sold and assigned the bond and mortgage to Henry C. Van Duzer, and at the time of the sale represented the bond and mortgage to be "his own," and that "it was all right in every way." There had been some payments made upon the note before the commencement of the action; but the amount admitted to be unpaid thereon was \$186.59 at the time of the trial. The defendants attempted to prove, under the third answer, that the holder of the note extended the time of payment, by agreement with the payee, in violation of their rights, but failed to prove any knowledge in the holder that they stood in that relation.

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*W. Barnes*, for the appellant.

*D. Sunderlin*, for the respondents.

*By the Court*, E. DARWIN SMITH, J. The question was fairly submitted to the jury on the trial of this action, whether the bond and mortgage was sold absolutely to the defendant John J. Earnest, and the note in question, and upon which the action was brought, was received in payment therefor. And the jury was also distinctly advised that if such was the fact, the plaintiff was entitled to recover the balance due on said note, with interest; and the jury was also distinctly charged that if the said note was made for the accommodation of John Earnest, the payee, and to enable him to raise money on it, it was open to the defense of usury. The jury was also advised that if said note was so made for the accommodation of the payee, and was sold to Kingsley for a less amount than upon its face purported to be due thereon, so as to secure to said Kingsley a greater rate than seven per cent for the use of his money, the transaction was usurious and the note void, whether Kingsley knew it at the time he purchased it, or not. In these particulars the issues of fact, upon which the case depends, were properly submitted, and the rules of law applicable thereto correctly stated to the jury; and the exceptions thereto are not well taken. The questions belonged to the jury, and the exception taken to the refusal of the circuit judge to charge as requested, that the plaintiff was entitled to recover as matter of law the amount of the note, is not well taken. The exception to that portion of the charge in which the circuit judge stated to the jury "that if they found that the bond and mortgage to John Earnest was turned out to John J. Earnest merely as collateral security, to be available to him only in case John Earnest failed to pay the note, the note was not a valid note in his hands, and if it was transferred to Kingsley upon a usurious consideration, the note was void," is not well taken.

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A promissory note, to be the subject of sale, must be an existing valid note in the hands of the payee, and given for some actual consideration, so that it can be enforced between the original parties. The doctrine is too well settled to be now questioned, that such a note, not valid in the hands of the payee, cannot by him be rendered valid by a sale thereof to a bona fide purchaser at a rate of interest exceeding seven per cent. To be the subject of such sale, it must have a pre-existing validity. Its breath of life cannot be imparted through a usurious transaction. (*Cram v. Hendricks*, 7 Wend. 569. 7 John. R. 361. 13 id. 52. 15 id. 44. *Powell v. Waters*, 8 Cowen, 669.) The security given to the accommodation makers of such paper can have no greater validity than the note itself, and cannot render valid an obligation otherwise tainted with usury. Until the accommodation maker was compelled to pay the note, he could not resort to the bond and mortgage if it were given as a mere collateral security; and if the note was void and could not be enforced, the security to the maker would necessarily also fall. The fact that indemnity was given to the accommodation maker, did not render the note any the less usurious. The charge was clearly right, on this point. The argument that there can be no usury where there is no corrupt agreement, and that there can be no corrupt agreement to take usury when the party discounting the paper is ignorant that it was merely made for the purpose of raising money thereon, and is in fact informed at the time that it is valid business paper, is not sound if the legal effect of the transaction involves a usurious agreement; for the law will not allow men to assert their ignorance of the law, or disclaim an intention to do what their express contracts imply. Usury involves no particular moral turpitude. It consists in the violation of a statute forbidding the taking of more than seven per cent on the loan and forbearance of money. There is no special appropriateness in terming such an agreement corrupt, in a civil action. Odious as the taking of usury has ever been, in the




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scale of crime the offense is merely *malum prohibitum*—not *malum in se*. In many cases of decided usury there was not even an intent to evade the statute. In many cases the contracting parties did not suppose, at the time, that they were violating any law; and such I doubt not was this case. Kingsley asked the payee, Earnest, when he purchased the note, what it was given for, and he was told that it was given for a bond and mortgage on the place of Earnest. He asked Earnest at first, he says, before the sale, if it was given for a valuable consideration, and was told in answer that it was. So far as Kingsley was concerned, here was clearly no intention to evade the statute, or to take usury, and he was doubtless deceived and defrauded by Earnest. He supposed he was purchasing business paper, as he lawfully might do, at a discount exceeding seven per cent. He knew, however, that he was stipulating to get more than seven per cent for the use of his money; but he did not intend to make a loan of money, but to purchase a note. The transaction was nevertheless really a loan of money. The note having in fact, as against the makers, no validity, never having had, before such transfer, any legal inception, was incapable of sale; and Kingsley in purchasing it took the precise place of the payee. The money advanced by him became a loan of money upon the note, and such loan being at a rate of discount beyond legal interest was, as an original contract, according to numerous adjudged cases, necessarily usurious. (*Aeby v. Rapelye*, 1 Hill, 10. *Munn v. Commission Co.*, 15 John. 44. 8 Cowen, 690. 20 John. 286. 2 Duer, 52. 4 *id.* 408. 5 *id.* 475.) And the ignorance of Kingsley in regard to the true character of the paper, does not affect the question, or change the character of this note. (*Hall v. Wilson*, 16 Barb. 548. *Powell v. Waters*, 17 John. 176. *Dowe v. Schutt*, 2 Denio, 624. *Holmes v. Williams*, 10 Paige, 326.) This doctrine in regard to the usurious character of a promissory note, nominally sold upon a false representation that it was



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business paper and given for value, had its origin before usury was made, as it is by our statute of 1837, a criminal offense, and is hardly reconcilable with the principles which would govern the questions upon the trial of an indictment for the usury. Section 6 of the act of 1837 (*chap. 430, Sess. Laws*) declares that any person who shall directly or indirectly receive any greater interest, discount or consideration than is prescribed by law and the statute, and in violation thereof, shall be deemed guilty of a misdemeanor. Most clearly, I think, upon an indictment under this statute, Kingsley could not, upon the evidence given in this case, be convicted. The *quo animo*—the criminal *intent*—is entirely wanting. How the law of usury can be one thing in a civil court and quite another in a criminal court, is an incongruity I will not attempt to explain or reconcile. Independently of adjudged cases, I should think on the sale of an accommodation note, like this, that there was no usury in the transaction, and that it presented simply a case of *fraud* where the money was obtained by fraud and false pretenses. In such case the note, not having had any valid inception, could not be the subject of sale, and the remedy of the person defrauded would be limited to the person committing the fraud, to recover for the money advanced. The person negotiating the note, in such case, would be estopped from setting up the defense of usury to an action on the paper, or for money had and received. (The objection of the defendants' counsel that the makers of the note in controversy in this action are estopped from setting up the defense of usury, I think cannot be maintained. I think it would be entirely just.) They gave John Earnest their own paper, for the purpose of enabling him to raise money thereon. They thus put it into his power, by the form of the transaction, to commit the fraud which he perpetrated upon Kingsley; and as between the two parties they, I think, ought rather to suffer than he, from the fraud committed, as the paper has been used for the purpose de-

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signed. If John Earnest could be deemed their agent to negotiate said note, his representations on making such negotiations would be as binding upon them as if made by themselves, and the case would come within the rule as stated in *Truscott v. Davis*, (4 Barb. 495,) and *Anderson v. Broad*, (2 E. D. Smith, 530.) But no adjudged case has extended the doctrine so far as to preclude the defendants in this action from making the defense of usury here interposed.

Three other exceptions were taken to the refusal of the circuit judge to strike out evidence previously given on the trial. I do not see upon what principle such applications were made; nor can I conceive of any ground upon which they could properly have been granted. When evidence has been duly taken, bearing upon the issues, on a trial, without objection, I know of no right on the part of the circuit judge to strike it out, or to exclude it from the consideration of the jury. If it is proper in kind though not in degree, or if objectionable otherwise upon some technical ground, all right of exception to it is waived by the parties by not objecting in time, and all rightful control over it by the court gone. It is only when evidence is received upon some *condition, mistake, or contingency*, that the judge can properly direct the jury to disregard it and treat it as not received; but when it has been absolutely given and received, it cannot in any way, in my opinion, be stricken out of the case, or disregarded. Such practice can only prevail where evidence is taken in writing by one officer, as before an examiner in chancery under the former practice, to be used before some other officer or tribunal. If the evidence is objected to when it is offered, and the objection overruled, an exception will then lie; and if such objection has been made in due time, and a proper exception duly taken, it is superfluous, if not disrespectful, to ask the court afterwards to strike out such evidence. One valid exception for an error committed by the judge is sufficient to assert and maintain all of the rights of the parties on

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the question. But upon the merits of the evidence thus referred to I see no valid objection to it, and think it properly received. The order of the special term denying a new trial should therefore be affirmed.

[MONROE GENERAL TERM, December 2, 1861. *Johnson, Welles and Smith*, Justices.]

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WALKER vs. WHITE.

Upon making a decree setting aside a deed executed by a judgment debtor, as fraudulent and void against his creditors, the court has no power to direct the premises to be sold, as in case of a sale upon execution, for the purpose of paying the judgment debt.

In such a case a court of equity acts upon the *person* and not upon the *estate* of the debtor; and may appoint a *receiver*, to take a conveyance of the land from the debtor, and the land may then be sold by the receiver, and a title obtained through his deed.

ACTION to set aside a deed of real estate, executed by the sheriff of Wayne county to the defendant, Edward White, and to compel the execution of a deed by said sheriff of the same premises to the plaintiff. On and previous to the 14th of February, 1855, Miles Merrill owned the said real estate; and on that day executed a deed thereof to his son James E. Merrill, without any consideration, and with intent to defraud the grantor's creditors. In November, 1857, Porter G. Denison and David E. Garlic, creditors respectively of Miles Merrill, by judgment recovered in this court in March, 1857, severally commenced actions against Miles Merrill, James E. Merrill and Norton W. Merrill, to have said deed to James E. Merrill set aside for the fraud, and the premises sold to satisfy their judgments. The complaints in the actions were not answered, and judgments were obtained therein in February, 1858, setting aside the deed, and directing a sale of the premises as in case of a sale on

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execution for the purpose mentioned. On the 27th of February, 1858, copies of the judgments were handed to the defendant Nottingham, sheriff of Wayne county, who, in virtue thereof, sold the premises at public sale to Isaac Miller, giving him certificates of sale, as in case of a sale on execution. Miller assigned the certificates to the plaintiff on the 27th of April, 1858. On the 1st of August, 1859, the plaintiff demanded a deed of the premises of the sheriff, which the latter refused to give. In December, 1858, and January and June, 1859, four several judgments in this court were obtained by the defendant, Edward White, against Miles Merrill, and then duly docketed. On the 21st of July, 1859, Edward White, by virtue of his judgments, presented the necessary papers to the sheriff of Wayne county, and paid him the requisite amount to redeem the premises from the sale by the sheriff aforesaid; and the sheriff, on the 1st August, 1859, executed to him a deed of the premises on such redemption, dated the 26th of July, 1859. On the 3d of August, 1859, Miles Merrill executed a quit-claim deed of the premises to Edward White. The papers in the action of Denison and Garlic against Miles Merrill and others were given in evidence by the plaintiff. It was claimed by the defendants at the trial that no valid sale had been made by the sheriff, the decrees not being process; but if otherwise, that the judgments of Edward White were liens on the premises, and his redemption was perfect. The referee decided that the judgments in favor of Edward White against Miles Merrill were not liens on the premises; that White, therefore, was not entitled to redeem, and that the plaintiff was entitled to a deed from the sheriff. It was therefore adjudged by the referee that the deed to White was void; and that the sheriff, on request, execute a deed of the premises to the plaintiff; also that the defendant, Edward White, pay to the plaintiff the costs of the action. Judgment having been entered on the report, the defendants appealed to the general term.

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*T. R. Strong*, for the appellants. I. The judgments in the action of Denison and Garlic against Miles Merrill and others, so far as they order a sale of the premises, and the execution of a deed to the purchaser by the sheriff, are unwarranted by law, and void. Independent of statute, the court has not power to direct the sale and conveyance of real estate by a sheriff, referee, or any person or officer. It required statutes to invest the court with power to order the sale and conveyance of real estate of infants by guardian; of lands mortgaged to satisfy the mortgage by the sheriff or referee; in partition suits by commissioners or a referee; on executions to enforce judgments for the payment of money by a sheriff, and in similar cases. The only mode by which the court can effect a transfer of title to lands in cases not provided for by statute, is by ordering a conveyance by the owner, directly or through a receiver. These positions are established by the following cases: *Jackson v. Edwards*, (7 Paige, 404, 5;) *The Chautauque Co. Bank v. White*, (6 Barb. 589, and cases there cited;) 2 Seld. 236; 2 Hoff. Ch. Pr. 94, 5, n. 3; *Chautauque Co. Bank v. Risley*, (19 N. Y. Rep. 369.) They were expressly adjudicated by this court in this district in *Muir v. Ashby*, decided in 1854 or 1855, not reported.

II. The provisions of statute making judgments a lien on real estate, and providing for the sale of the real estate on execution, do not sustain the judgments in question and the sales under them. (1.) They relate only to judgments for the payment of money, and docketed as therein prescribed. (*Code*, §§ 282, 5, 6, 7. 2 R. S. 360, 1, 3, § 1. *Laws of 1840*, p. 334, § 25.) (2.) They provide that the execution must be directed to the sheriff; be subscribed by the party or his attorney; state the county where the judgment roll or transcript is filed; the time of docketing; and shall require the officer to satisfy the judgment out of the personal property of the debtor, and if sufficient personal property cannot be found, out of the real property belonging to him on the day

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the judgment was docketed, &c. (*Code*, §§ 289, 290. 2 *R. S.* 367, § 24. *Laws of 1840*, p. 334, § 24.) The judgments in question are not for the payment of money; they have not been docketed; and the copies of the judgment handed to the sheriff can in no sense be regarded as executions to enforce the judgments, having none of the substantial requisites of that process.

III. The deed of Miles to James E. Merrill having been executed without consideration and with intent to defraud creditors, as proved by the plaintiff, by the decrees given in evidence under which he claims title, was void as to Edward White, a creditor; hence his judgments were liens on the land, and he had a right to redeem. A deed intentionally made to defraud creditors is void as to subsequent as well as prior creditors. (*King v. Wilcox*, 11 *Paige*, 589, and cases there cited.) Clearly, White might enforce his judgments as liens on the land, by a sale of the land on execution; and upon the same principle he might avail himself of the judgments as liens on the land to redeem from the prior sale. The deed was a nullity as to the right and claim of White under his judgments. (*Chautauque Co. Bank v. Risley*, 19 *N. Y. Rep.* 369, and cases cited.) Proceedings to redeem by the defendant White by virtue of his judgments are equally a repudiation of the deed to James E. Merrill, and an effort to displace it, as proceedings to sell the land on execution, the right to take which is undoubted.

*H. R. Selden*, for the respondent. I. The deed from Miles Merrill to James E. Merrill was not "*per se void*," but was *voidable* only, as against judgment creditors, and at their election. It was valid between the parties, and divested the grantor of all his interest in the premises. A deed or assignment, "though void as against creditors, is always valid between the immediate parties." (*Burrill on Assignments*, 406. *Averill v. Loucks*, 6 *Barb.* 477. *Ames v. Blunt*, 5 *Paige*, 13, 17, 18, 22. *Upton v. Bassett*, *Cro.*

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*Eliz.* 445. *Hone v. Henriques*, 13 *Wend.* 240, 243. *Briggs v. Palmer*, 20 *Barb.* 405. *Clute v. Fitch*, 25 *id.* 428.) The language of the statute is conclusive on this point. "Every conveyance, &c. made with intent to hinder, delay or defraud creditors, &c. as against the persons so hindered, delayed or defrauded, shall be void." (3 *R. S.* 5th ed. p. 224, § 1.)

II. The defendant's (White's) judgments were not a lien upon the premises, so as to entitle him to redeem the lands, admitting the right of redemption to exist. (3 *R. S.* 5th ed. p. 652, § 67, [51.] *Erwin v. Schriver*, 19 *John.* 380. *Hurd v. Magee*, 3 *Cowen*, 35, 39. *Ex parte Wood*, 4 *Hill*, 542.) The decision in *Hurd v. Magee*, above cited, shows that the conveyance to James E. Merrill was effectual to cut off the lien of White's judgments unless he proved the fraud, and in this case no proof whatever was offered on the part of White to show the conveyance fraudulent. (See *Jackson v. Town*, 4 *Cowen*, 599, 603; *Verplank v. Sterry*, 12 *John.* 536, 557, 8; *Wood v. Chapin*, 3 *Kern.* 517.) The record of the judgments in the cases of Denison and Garlic, declaring the conveyance void as against them, was not available to the defendant White, to show that the deed was also void as against him. Judgments "are not admissible in a subsequent suit, unless they are not only between the same parties, but also upon the same matter coming in question and directly upon the point." (2 *Phil. Ev.*, *Edw. ed.*, 17, 18.) All that was in issue in the cases of Denison and Garlic, and all that was decided, was, that as against them the conveyance to James E. Merrill was fraudulent and void. To this extent all the parties to that suit were concluded; but that judgment was not only not conclusive, but it was not admissible, upon the issue, whether the conveyance was void as against White.

III. There was no evidence before the referee authorizing him to find that the sale was fraudulent as against White, and if there was, there is no exception which raises that



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question. (1.) It appears that the debt to White did not exist until after the sale under which we claim. Under such circumstances, we insist the deed could not be fraudulent as against him. If that be not so, then, (2.) There is neither an allegation, nor any evidence in the whole case, that Miles Merrill owed any thing when the deed was made, and if he did not, it was entirely valid. (*Jackson v. Town*, 4 *Cowen*, 599, 603. *Tripp v. Vincent*, 3 *Barb. Ch. R.* 615. *Jackson v. Seward*, 5 *Cowen*, 67, 73.) (3.) In the cases above cited the conveyances were voluntary, but in the present case the deed recites a full pecuniary consideration—\$4000—and there is not a particle of evidence to rebut the presumption of its payment. (*Wood v. Chapin*, 13 *N. Y. Rep.* 517.)

IV. The sale on the judgments divested the title of Miles Merrill at the time of the sale, even if the title remained in him, and left nothing for White's judgment to become a lien upon; or if it did, no right of redemption existed on account of it. (*Chautauque Co. Bank v. Risley*, 19 *N. Y. Rep.* 370, 373 *et seq.* *Same v. White*, 2 *Seld.* 249 *et seq.*) If the title was not divested without a deed, the right of redemption did not exist—as that is a purely statutory right, and is only given in cases of sales on execution. (3 *R. S.* 5th ed. p. 644, § 13; p. 651, §§ 56, 61; pp. 652, 3, §§ 66, 67.) The court could not by its decrees give a right of redemption where it did not exist; nor do the judgments or decrees in the cases of Denison and Garlic assume to give any such right.

V. The copies of the judgment under which the sale was made were a sufficient authority for the sheriff to make the sale. (*Code*, § 285.) The course pursued is directly within the provisions of this (285th) section of the code, and it is in accordance with the practice of courts of equity, where real estate is ordered to be sold to pay debts.

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*By the Court.* E. DARWIN SMITH, J. The judgments rendered in the actions of *Denison v. Merrills*, and *Garlic v. Merrills*, declaring the deed from Miles Merrill to James E. Merrill fraudulent and void as against the plaintiffs in those suits, simply removed that deed from the way of the plaintiffs, and entitled them to proceed to sell the premises in payment of their debts. The plaintiffs might have had a receiver appointed, to take a conveyance of said land from the judgment debtor, by whom, under the directions of the court, such premises might have been sold and a title obtained through the receiver's deed; or they might have issued new executions and sold the land thereupon. The provision in the decree directing the sheriff to sell said land in the manner prescribed by law, and that he execute to the purchaser a certificate and deed in the manner required in the code in respect to sales upon executions, it seems to me, was entirely unauthorized. It is not a mode of conveying or transferring title to real estate prescribed or authorized by any statute. In *Jackson v. Edwards*, (7 Paige, 404,) the chancellor said that, "independent of the statutory provisions in aid of the power of the court, the ordinary mode in which courts of equity transferred the legal title upon a sale under a decree, was by operating upon the parties themselves, and compelling them to join in a conveyance to a purchaser."

In *Chautauque County Bank v. White*, (6 Barb. 589,) it was held that the court of chancery, upon a creditor's bill, had no power to order the sale of real estate. The court of appeals reversed this decision, holding that the purchaser would get a good title under the receiver's deed; the judgment debtor having conveyed the title to the receiver. (S. C., 2 Seld. 236.)

In this case Judge Gardiner says that, in all cases of fraudulent trusts, the court may in its discretion direct a sale by a master, and compel the debtor and trustee to unite in a conveyance to the purchaser, or the fraudulent conveyance may be annulled and the creditor permitted to proceed to

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sale on his execution. This same question was again before the court of appeals, in respect to the same receivership and the force of his deeds, in *Chautauque County Bank v. Risley*, (19 *N. Y. Rep.* 369.) In that case the doctrine was affirmed that courts of equity could transfer the title to real estate by requiring a conveyance to a receiver, and by a sale and conveyance by him. Judge Comstock says as follows: "The fraudulent conveyance being annulled by the decree, the receiver, under an assignment to him, takes the title, which he can convey to a purchaser. But the title of the receiver, and of the purchaser from him, rests upon *the debtor's own conveyance* made under the directions of the court, and has no relation to the judgment." The title in such cases must be passed by *deed*, and by the debtor's deed. The court of equity acts upon the person and not upon the estate. I cannot see, therefore, how the plaintiff can get any title to the premises under the sale mentioned in this complaint. The right of redemption claimed by the defendant fails for the same reason. The lien of the original judgments remained undischarged, and the plaintiffs may issue new executions and sell the land, or they may still apply to the court for the appointment of a receiver to take a conveyance thereof from the judgment debtor. In this view of the rights of the parties, the judgment should be reversed and the complaint dismissed. And as the parties have been in a common error in respect to their rights, it shall be without costs to either party.

[MONROE GENERAL TERM, December 2, 1861. *Johnson, Welles and Smith*, Justices.]

**HOTCHKISS and others vs. THE AUBURN AND ROCHESTER  
RAIL ROAD COMPANY.**

Where proceedings were taken by the Auburn and Rochester Rail Road Company, before a county judge, under the acts of 1836 and 1838, incorporating said company, for the appointment of a jury of appraisers to assess the value of the land required for the construction of its road through a particular county, and one of the owners of land taken was an infant; *it was held* that it was indispensable that some proper person should be appointed to appear for such infant before the jury of appraisers, to represent her, and attend to her interests, on the appraisement.

*Held also*, that although an attorney was appointed to appear before the jury and protect the interests of the infant, on the appraisement, yet if he failed to attend before the jury, or to represent her interests there, his appointment was nugatory.

That the statute was not complied with simply by the making an appointment of an attorney for the infant owner, by the county judge, sufficient in form; but that it was the duty of the rail road company to see that some reliable person was appointed, residing in the vicinity, who should in fact personally appear before the jury and protect the interests of the infant. And that until such appointment and appearance, the jury had no jurisdiction of her person, to entitle them to proceed to appraise the land, or the damages for taking the same.

The statute was designed to secure the actual attendance of some fit person, before the jury, as guardian or attorney, to attend personally to the interests of the infant upon the appraisement. And without such appearance, all the doings of the jury, in the proceeding, are entirely unauthorized and void.

Upon the death of a person seised of real estate, all claim for damages done to the estate, and for the rents and profits thereof, down to that time, go to his executor, and belong to the personal estate. Therefore, in ejectment, brought by devisees, the plaintiffs are only entitled to recover the possession of the premises, with damages for withholding the same, and the rents and profits thereof, from the time their title to such rents and profits accrued.

A claim for damages done to land occupied adversely by the defendant cannot be sued for and recovered until after the plaintiff has recovered possession. A claim for injuries of that nature cannot be united with a claim to recover the possession of the land.

Under section 67 of the code, a plaintiff may unite a claim to recover the possession of land with a claim for damages for withholding the same, and for the rents and profits.

But this provision gives no new rights of action; and the plaintiff is not bound to elect, as between those causes of action, which he will go for.

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THIS action was brought by Leman B. Hotchkiss and Lucretia his wife, to recover the undivided half of 3 6-10th acres of land in the town of Phelps, county of Ontario. The action was commenced on the 17th day of May, 1849, and was tried in February, 1861. It was proved or admitted on the trial that Thaddeus Oaks, of the town of Phelps, died in 1824, seised of a farm in that town, called the Oaks farm, embracing the premises in question, leaving him surviving his wife Fanny, and two children, Nathan and Lucretia; that Thaddeus Oaks had owned and possessed such farm, and had lived and resided upon it, in the town of Phelps, from the year 1800 until he died. Fanny Oaks intermarried with Elias Cost in 1828. Mr. Cost died in 1850, and Mrs. Cost in 1851. Lucretia Oaks married Leman B. Hotchkiss on the 1st May, 1844, and died July 31, 1855, leaving five children, viz: Thaddeus O., Nathan, William B., Fanny T. and Alice L. Hotchkiss. Lucretia Hotchkiss was born March 4, 1824. She was born on the Oaks farm, in the town of Phelps, and lived and resided thereon, in such town, from her birth, with her mother and in her family, until she married Leman B. Hotchkiss; and during that period she was only temporarily absent at school, at different times in 1839, 1840 and 1841. Her residence and domicil was in the town of Phelps from her birth until her marriage. The defendant took possession of the premises in question in May, 1841, and constructed a rail road thereon, by making excavations and embankments, and laying and completing the track, and soon after, and in July, 1841, commenced running their cars on the road; and ever since taking possession the defendant has retained the possession and used the land for the purpose of its track and the running of its cars, and the operation of the said road, holding exclusive possession and claiming exclusive title, and denying the right of Nathan Oaks and Mrs. Hotchkiss and the plaintiffs to any interest therein. After Cost married Mrs. Fanny Oaks, Lucretia Lived in their family, in the town of Phelps, and on the Oaks farm, until she married L. B.

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Hotchkiss. Cost sent her to school at Albany in September, 1840, where she remained, at school, until September, 1841. She died July 31, 1855, after the commencement of this suit, leaving five children, all under the age of twenty-one years. On the 27th of September, 1858, Leman B. Hotchkiss as executor of the will of Mrs. Hotchkiss, and the said children by their father as guardian ad litem, were substituted as parties plaintiff in the action in the place and stead of the said Lucretia, by an order of the court. The annual value of the premises in question, (the part of the Oaks farm taken by the defendant,) for farming purposes, in the condition they were in when the said road was built, was from \$4 to \$6 per acre. The damage to the land by reason of the excavation and embankment was \$200. The land was worth from \$60 to \$100 an acre. There was a building on the premises worth \$100 when the rail road was made, belonging to Cost, who removed it and sold it to the defendant for \$200. The plaintiff's counsel presented in evidence a statement of rents and profits and damages, and of the interest thereon, as claimed by the plaintiffs. The statement embraced annual charges on 3 6-10th acres, (the number of acres in the premises aforesaid,) at \$25.20 a year, from 1842 to 1861, with interest on each annual charge from the date thereof to the day of the trial; and also charges for damages to the land \$200, and removing the building \$200, with interest on each of these items for 20 years. The defendant objected in due time to the evidence of damages to the premises and for removal of the building, and to the evidence and claim of rents for the whole period, exceeding six years, and of all rents prior to the death of Lucretia Hotchkiss, and to interest on the rents and damages as claimed in such statement; and excepted to the decisions of the court receiving such evidence and allowing such claims. The plaintiffs also read in evidence an order obtained by default, at a special term, on the 27th September, 1858, directing that L. B. Hotchkiss, as executor &c. of Lucretia Hotchkiss, &c. and her said five

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children, be substituted plaintiffs in place of Lucretia Hotchkiss, deceased. The introduction in evidence of this order was objected to by the defendant. The plaintiffs also introduced in evidence a special term order made November 12, 1860, denying a motion to set aside such order for substitution. The defendant, to establish title in itself, introduced evidence of proceedings for the appraisement of the premises in question proposed to be taken for the construction and accommodation of its rail road, as against Nathan and Lucretia Oaks, under the act (chap. 290) to amend the act for the construction of the defendant's rail road, passed April 18, 1838. (*Laws of 1838, p. 282.*) All the proceedings required by the act, including the certificate of location, were proved by competent evidence, by the production of the originals, or by the record of the same, or sworn copies, except the petition, which having been lost, and due proof of its loss having been introduced, its existence in due form, and also its contents and verification, were proved by Amos Jones, the judge to whom it was presented, and who made the order for drawing the jury, &c. The notice of the drawing of the jury of appraisers, required by the 3d section of the act aforesaid, was served upon Lucretia Oaks, as required by that section, by leaving the same, on the 15th February, 1841, at her place of residence in Phelps, with her mother, at the house of Mr. and Mrs. Cost, where Lucretia resided; she, at the time of such service, being absent from home. A like notice was served upon Lucretia Oaks, of the meeting of the jury of appraisers, in like manner, on the 6th March, 1841. The defendant introduced in evidence a deed in trust from Lucretia Oaks to Willard Wells, dated 29th April, 1844, of all her lands in Phelps, embracing the premises in question, which divested her of all estate in the same. The defendant claimed that this deed showed that neither Leman B. Hotchkiss or Lucretia Hotchkiss had any such title to or estate in the premises in question as enabled them to sustain this action. The deed also contained an admission on the

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part of Mrs. Hotchkiss that she was not the owner of the premises in question. The defendant also introduced in evidence the will of Lucretia Hotchkiss, dated the 12th January, 1850, made and executed under a power reserved by her in the deed to Willard Wells, in which she gave and devised all her real and personal estate to her said five children, &c. and appointed her husband L. B. Hotchkiss their guardian, until they should attain 21, and gave him the power to use, occupy and control, as such guardian, for the use and benefit of such children, the said real and personal estate so devised and bequeathed to them. The defendant's counsel moved the court that the plaintiffs be required to elect which cause of action they would insist upon; whether the claim for injuries to the premises by the defendant, or the claim for the recovery of the premises, the two claims being inconsistent with each other. The court denied the motion, and the defendant excepted. The defendant also objected that the plaintiffs had no right to recover in this action any damages for injuries claimed to be done to the premises by the defendant, by the excavation or embankment, or any damages for the removal of the building, for the reasons before stated, and requested the court to decide and direct the jury to reject these claims. The court refused so to decide and direct, &c. The defendant then objected, and insisted that the plaintiffs, if entitled to recover rents and profits, could only recover them for the period of six years, and could not recover any prior to the death of Mrs. Hotchkiss, and requested the court to so decide and direct the jury; and the court refused to so decide and direct. The defendant's counsel also insisted that the order of substitution was void, &c. and moved that the complaint be dismissed on that ground, and upon the ground that the order of substitution being void, and Lucretia Hotchkiss being dead, the complaint did not contain facts sufficient to constitute a cause of action. The court denied the motion.



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The defendants' counsel then moved that the complaint be dismissed upon the following grounds, viz :

"1. The order of 27th September, 1858, for the substitution of L. B. Hotchkiss as executor, &c. of Lucretia Hotchkiss, deceased, and Thaddeus O. Hotchkiss and others, infants, by L. B. Hotchkiss, their guardian ad litem, as parties plaintiffs, in the place of Lucretia Hotchkiss, deceased, is absolutely void, having been applied for and made after the expiration of one year from the death of Lucretia Hotchkiss. The action could only have been continued at the date of the order and of the application for same by supplemental complaint. If the order of substitution is void, the children and devisees of Lucretia Hotchkiss are not parties to the action, and L. B. Hotchkiss cannot recover any thing under the original complaint, neither the premises, nor rents and profits, or damages.

2. The original complaint does not state facts sufficient to constitute a cause of action either in favor of L. B. Hotchkiss, in his own right, or as executor, &c., or guardian, or in favor of the infant children of Lucretia Hotchkiss, named in said order ; nor does such complaint, upon the assumption that such order of substitution is a valid order, contain facts sufficient to constitute a cause of action in favor of either of the said parties.

3. If the parties named in such order are to be deemed as substituted as plaintiffs as aforesaid, the complaint is void for a misjoinder of parties, and of causes of action, viz. in uniting in the complaint L. B. Hotchkiss, as executor, &c. as a party plaintiff with the other parties as plaintiffs in their own right ; and in uniting a claim for injuries to the premises in question committed by the defendant while in possession, and the plaintiffs, or Lucretia Hotchkiss, not having regained possession when the action was commenced, with a claim for the recovery of the said premises from defendant, the defendant being in possession when the action was instituted ; and also in uniting in the complaint a claim in the favor of

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L. B. Hotchkiss as executor, &c. with a claim of his to real estate in his own right, and also with a claim of his children to real estate. The defendant having had no opportunity to demur or answer the complaint since the order of substitution was made, the objection for misjoinder can now be taken.

4. There is no issue of fact or law existing between the plaintiffs and the defendant. The original complaint has been abandoned, and no answer or demurrer has been interposed to the complaint since the substitution; the defendant has not been allowed an opportunity to put in either; no supplemental or amended complaint has been served on the defendant.

5. Neither L. B. Hotchkiss in his own right, or his children, have shown any present title or present right of possession to the premises in question. The evidence does not show that L. B. Hotchkiss has any title as tenant by curtesy, but shows the contrary; and if he had shown this, no such claim or cause of action is stated in the complaint.

6. Under the complaint, L. B. Hotchkiss cannot recover the premises as guardian of such children, no such title is set forth in the complaint; and the complaint cannot be amended by inserting therein such cause of action if it exists; it being an entirely different cause of action from those stated in the complaint.

The causes of action set forth in the complaint if any, are wholly unproved.

The complaint cannot be amended by inserting a new cause of action.

7. The plaintiffs should have been compelled to elect for which cause of action they or either of them will proceed, either the claim for injuries to the premises by the defendant, or the claim for the recovery of these premises; these two claims are inconsistent with each other, and the plaintiffs should also have been compelled to elect whether they or either of them will proceed for any claim of L. B. Hotchkiss as executor, &c., or for the recovery of the real estate.

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The plaintiffs not having elected, have no right to recover at all.

8. Neither the plaintiffs nor either of them, if entitled to recover, can recover in this action any damages except for the rents and profits which may have been withheld by the defendant, and only rents and profits for six years in all, and no rents and profits, or damages prior to the death of Lucretia Hotchkiss.

9. The defendant has made out a perfect title to the premises under the proceedings of appraisement put in evidence; such proceedings are in all respects regular and valid, and have been established by competent evidence.

10. The jurisdictional facts necessary to give the county judge jurisdiction, have been proven by competent evidence.

11. The plaintiffs have shown no title to the premises in question, nor have any of them shown any title thereto."

The court denied the motion to dismiss the complaint, and the defendant's counsel then excepted.

The counsel for the plaintiffs presented the following points:

"1. It does not appear that the directors caused such examinations and surveys to be made as might be necessary to the selection by them of the most advantageous route for their road.

2. It is not proved that a petition complying with the requirements of the statute was presented to the judge; and that was the first step, after making surveys and filing certificates of location, to be taken by the defendant for the purpose of acquiring titles to the premises; also it is not proved that an order or appointment was thereupon made in respect to the drawing of the jury and the services of notices as prescribed by the statute.

3. It is not proved that notice of the drawing of the jury appraisers was served personally on Mrs. Hotchkiss: the contrary appears.

4. It appears that Mrs. Hotchkiss, during the proceed-

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ings to acquire titles, resided in Albany, and service of notice, by leaving it at her former residence in Phelps, could not avail.

Services by posting could only be made after proof on oath, to the satisfaction of the judge, that she had no residence in the county of Ontario, and no such proof was given; at least such proof was required to render services by posting sufficient.

The notice, which it is claimed by the defendant was served, was invalid in not having been signed by the directors in their names or by their authority, and in not having been authorized by them.

5. It does not appear that due proof of the service of the notice upon Mrs. Hotchkiss of the drawing of the jury was made before the drawing thereof, as required by the act.

The recital in the order of the judge is not proof, not being made so by law; nor is the certificate of the appraisers, which embraces the substance of the order, evidence of the service. It is made evidence of their appointment and subsequent proceedings, not of any thing previous to their appointment.

6. It does not appear that due proof was made to the appraisers of the service of the notice of their first meeting.

The affidavit should have stated where the service was made. Due proof could not be made by affidavit.

7. It does not appear that Thomas Smith, the person appointed to appear for Mrs. Hotchkiss to represent her interests before the appraiser, appeared before the jury of appraisers; but the contrary is shown. Also, it is not proved that notice of the meeting of the jury of appraisers was served on Mr. Smith.

8. The damages of Mrs. Hotchkiss were not separately specified, and paid or deposited in bank to her credit.

9. It was irregular and improper to assess any proportion of the damages to Mr. and Mrs. Cost, or deposit the damages to their credit in connection with Mrs. Hotchkiss and her

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brother. Besides, the damages of Mr. and Mrs. Cost had been released.

10. It is not proved that the appraisers assessed the value of the land proposed to be taken. The value should have been stated in the certificate of the appraisers."

The jury, under the direction of the court, rendered a verdict in favor of the plaintiffs for an equal undivided half of the premises described in the complaint, assessing the damages of the plaintiffs for withholding thereof at \$900, and the defendant excepted to the decision. The court thereupon granted an order allowing the defendant sixty days to prepare and serve a case and exceptions, and allowing the plaintiffs the same time to prepare and serve amendments, and that the same be heard in the first instance at the general term, and that all proceedings be stayed until the hearing and decision of the same at general term.

*T. R. Strong*, for the plaintiffs.

*A. C. Paige*, for the defendant.

*By the Court*, E. DARWIN SMITH, J. The exceptions which should, properly, be first considered, in the examination of this case, relate to the parties prosecuting the action, and their right to maintain the same. The objection is that the order of the 27th of September, 1858, substituting the present plaintiff in the place and stead of Lucretia Hotchkiss, deceased, and the order of the date of September 12, 1860, refusing to set aside said order, were improperly admitted in evidence. These exceptions cannot be sustained. These orders were not the proper matters of evidence or exception. They belonged to the pleadings in the cause, and should have been annexed to the complaint, and became virtually a part thereof; and it was no more exceptionable to read them on the trial than it would have been to read the complaint in

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the action. The objection that the first order was not applied for within one year from the death of Lucretia Hotchkiss, may have been expressly waived when the said order was granted. And this may have been the precise ground upon which the court refused to set it aside on motion made for that purpose. If that were not so, and the motion to set aside the first order for any reason was improperly denied, the party had a complete remedy by appeal. Such questions of practice cannot properly be raised or considered on the trial of the issue, at the circuit. The substitution of the present plaintiff in the place of Lucretia Hotchkiss does not change the rights of the parties, and the action must obviously be continued, to enforce the same rights set up in the original complaint, and cannot be prosecuted to enforce any new rights depending upon her death, except as such death, by descent or under her will, cast such rights upon the present plaintiffs.

The action is ejectment, to recover the undivided half of  $3\frac{1}{2}$  acres of land taken by the defendant, in 1841, and since used by it for rail road purposes; and unites, as is allowed by the code, a count for use and profits of the land. The title of Lucretia Hotchkiss in her lifetime, to the premises in question, and the right of recovery for the same by the present plaintiff, is unquestionable, unless such title was divested by the proceedings of the defendant to acquire such title, under the acts of 1836 and 1838, incorporating the defendant and prescribing the manner in which it might acquire title for the use of such corporation, independently of the questions which arise upon the ante-nuptial agreement between said Lucretia and the plaintiff, Leman B. Hotchkiss, and other questions which arise upon the defense. The proceedings instituted by the defendant before the Hon. Anson Jones, county judge of Ontario county, for the appointment of a jury of appraisers to assess the value of the land required for the construction of the defendant's rail road in and through

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the county of Ontario, having been admitted in evidence by the circuit judge, present no question of exception on the part of the defendant, except so far as such proceedings are held invalid. Such proceedings as presented in the evidence, disregarding all other objections made by the plaintiffs thereto, do present one ground of defect in the defendant's title to said premises, which I think entirely unanswerable. Lucretia Hotchkiss was, at the time of instituting such proceedings, a minor, and was at the time absent from her proper home and domicil—her mother's house in Phelps—attending school in Albany. Conceding that the service of the several notices of said proceedings was properly made upon her, according to the provisions of the defendant's charter as amended in 1858, still, as she was an infant, it was indispensable that some proper person should be appointed by the county judge conducting such proceedings, to appear for her before the jury of appraisers, to represent her, and attend to her interests on the appraisement.

The appointment of Thomas Smith to appear before said jury and attend to her interests on such appraisement, was sufficient in form, but the non-attendance of said Smith before the jury, and his entire neglect in any way to appear for or represent her interests before the jury, renders such appointment entirely nugatory. The statute was not complied with simply by the making of an appointment of an attorney for her, by the judge, sufficient in form. It was the duty of the defendant to see to it that some reliable person was appointed, living in the vicinity, who should in fact personally appear before the jury and attend to and protect her interests, upon such proceedings. Until such appointment and appearance the jury had no jurisdiction of her person, to entitle them to proceed to appraise the land, or the damages of the said Lucretia, for the taking of such land by the defendant. The statute was designed to secure the actual attendance of some fit person, before the jury, as guardian or attorney, to

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attend personally to the interests of the infant upon such appraisal. And without such appearance, all the doings of the jury, in the proceeding, are entirely unauthorized and void. The title of the defendant to the property, therefore, fails.

The deed in trust of Lucretia Oaks to Willard Wells I do not think divested her of title to said land. The defendant was then in actual possession of the land, using the same and claiming title thereto adversely to all the world. Whatever might otherwise have been the effect of that deed, I think it did not divest her of title, against the defendant. The action to recover the land could not have been brought by the said Willard Wells in his own name, but must necessarily have been brought in the name of the said Lucretia, in her lifetime. The defendant entered into possession of the lands in question in the spring of 1841, and the deed of Lucretia to Willard Wells was dated April 29, 1844. She had not been in possession for more than three years before the execution of said deed, and it was clearly void as against the defendant. The plaintiff was therefore clearly entitled to recover the land described in the complaint.

The remaining points for consideration relate to the questions of damages for the occupation and deterioration of such premises, and of injury thereto, and of the use and profits thereof. This action was commenced May 17, 1849, and Lucretia Hotchkiss died July 31, 1855, leaving five children, who are the plaintiffs, with their father, who is the executor under the will of their mother, and guardian of his children, who are all infants. On the decease of Mrs. Hotchkiss, under her will the title to all her real estate vested in her children. In the prosecution of this action they were entitled, at the trial, to recover the land, and the use thereof as incident thereto from the time of her decease. All claim to damages done to the estate, and for the use and profits thereof at the time of her decease, went to her executor, and belonged



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to the personal estate. The plaintiffs were only entitled to recover the land claimed, with damages for withholding the same, and the rents and profits thereof from the time their title to such rents and profits accrued. The rents and profits before the death of Mrs. Hotchkiss, which occurred July 31, 1855, belonged to Mr. Hotchkiss, either in his own right, under the trust deed, or as executor, under the will. In either view they could not be recovered in this suit. The court directed a verdict for the plaintiffs for the recovery of the premises and damages to the land, and for the net profits thereof for twenty years, according to the claim made by the plaintiffs. This, I think, was error. The damage to the premises by reason of the excavation and embankment and ditches dug thereon, and the removal of buildings therefrom, belonged to, and could only be recovered by, the executor. (2 R. S. 4th ed. 114.) And besides, they could not be sued for and recovered until after the plaintiffs had recovered possession of the land. A claim for such injuries cannot be united with a claim to recover the land. (18 Barb. 496.) A disseisee of land cannot maintain trespass *quare clausum fregit* for an injury done thereto, until he regains possession. (19 id. 560. 12 John. 183. 1 id. 511. 4 Cowen, 529. 8 Wend. 58. 19 id. 507.) The code (§ 67) allows a plaintiff to unite a claim to recover real property with a claim for damages for withholding the same, and the rents, issues and profits thereof. Under this section the plaintiffs were entitled to insert with the claim for the land the count for damages for withholding the same, and for the rents and profits. But this provision gives no new rights of action. (19 Barb. 560.) The plaintiffs were not therefore bound to elect, as between these causes of action, which they would go for. They could properly recover for both the land and the use thereof after the death of Mrs. Hotchkiss, but not for any damages which belonged exclusively to the executor, or which were only recoverable after a re-entry. As the damages were recovered in gross,

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and embrace some amounts not recoverable in this action, in any event, even if it were prosecuted by Mr. Hotchkiss solely as executor, I think there should be a new trial.

New trial granted.

[MONROE GENERAL TERM, March 3, 1862. *Welles, Johnson and Smith*, Justices.]

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BEALS *vs.* THE HOME INSURANCE COMPANY.

Where a policy of insurance declares expressly, in the body thereof, that the same is made and accepted in reference to the terms and conditions thereunto annexed, one of which conditions is that in case of any loss on or damage to the property insured, it shall be optional with the insurers, to rebuild or repair the buildings within a reasonable time, on giving notice of their intention to do so, within thirty days after receiving the preliminary proofs of loss; and within the specified time after proof of loss, the insurers serve upon the insured written notice of their intention to rebuild the building destroyed, no action will lie, upon the policy, to recover the amount of the loss, until the neglect of the insurers to comply with their offer to rebuild, within a reasonable time.

The insurers having elected to pay the loss by restoring the building burned, they cannot be required to pay in any other way.

No action will lie, upon the policy, after the insured has refused to allow the insurer to enter upon the premises, to rebuild, and has himself proceeded to rebuild, without waiting for the expiration of the thirty days within which the insurers were entitled to make the election to rebuild.

A clause in a condition, giving the insurers thirty days within which they shall have the option to rebuild, is not repugnant to another part of such condition, in which it is stipulated that the company will pay the loss "within sixty days."

**A**CTION upon a policy of insurance against fire, to recover the amount of a loss of the insured property. The policy expresses that it is on the "brick Franklin House block" of the plaintiff, "occupied for stores and hotel purposes, and situate on the corner of Main and Coach streets, in the village of Canandaigua, N. Y." The complaint describes the subject of insurance as the "brick Franklin House block," and

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alleges a loss by fire of that property. The answer admits the issuing by the defendants of "a policy of insurance for four thousand dollars upon the brick Franklin House block situate on the corner of Main and Coach streets in the village of Canandaigua, N. Y.," but alleges that the policy is in the words and figures stated in the answer, setting forth a copy thereof. The plaintiff offered to show that he signed the application upon the assurance of Mr. Salisbury, the agent at Canandaigua through whom the policy in question was obtained, that it was correct. This offer was objected to and the proof was excluded. It is provided in the body of the policy, that if the "assured shall hereafter make any other insurances on the same property, and shall not, with all reasonable diligence, give notice thereof to this corporation, and have the same indorsed on this instrument or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect." There was also a like clause in the conditions annexed to the policy. The policy mentions among other additional insurances on the property, \$1000 in the Ontario and Livingston Mutual. It was proved at the trial that, subsequent to the issuing of the policy in question, the plaintiff obtained a policy of insurance upon the same property from the Lamar Insurance Company for \$1000, in place of the policy of the Ontario and Livingston Mutual, which was in force by renewal at the time of the fire, and which had not been entered upon the policy in suit, or otherwise acknowledged by the defendants in writing. The policy further provides, "that this policy is made and accepted in reference to the terms and conditions hereto annexed, which are to be used and resorted to, in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for." Among the conditions annexed to the policy is one as follows: "10. In case of any loss on or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged, with others of the same kind and quality, and to rebuild or repair the build-

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ing or buildings within a reasonable time, giving notice of their intention so to do, within thirty days after having received the preliminary proofs of loss required by the ninth article of these conditions."

At the time of the loss of the brick Franklin House block there were insurances thereon as follows:

In the Norwich Insurance Company, Connecticut,	\$5,000
Albany Mutual Insurance Company, N. Y., . . .	4,000
Lamar Insurance Company, N. Y., . . . . .	1,000
Home Insurance Company, N. Y., (the defendant,)	4,000
	<hr/>
	\$14,000

In each of the policies is a condition in respect to rebuilding, similar to the one above recited in the policy of the defendant. Within the time provided in the condition for that purpose, each of the four several companies gave notice to the plaintiff of their intention to rebuild the Franklin House block, and made preparations, and solicited permission to do so, but the plaintiff refused to allow them or either of them to rebuild. On the same day of the fire, which was Saturday, February 11, 1860, the plaintiff made arrangements to build on the site of the block a building of a different description, and on Monday following commenced the removal of the rubbish, and pressed forward the work of preparing the ground and putting up a building, so that early in March the walls of the first story were about completed. Much evidence was given at the trial as to the value of the Franklin House block, the cost of rebuilding, &c., and numerous exceptions to decisions on questions of evidence on those subjects were taken, all of which is immaterial, the plaintiff having, as decided by the court, failed to establish a cause of action.

When the plaintiff first rested the case, the defendant moved for a nonsuit on several grounds, which motion was denied. The motion was renewed after all the proofs in the case had been given, on the following grounds:

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“1st. That inasmuch as the policy expresses that it is on the brick Franklin House block, and the dining room spoken of by the witnesses formed part of the block in question, and was built of wooden material, the policy was not binding on the property.

2d. That the statements in the application and policy that the block therein mentioned was brick, constituted a warranty that the block was brick; and the fact that the dining room formed part of the block and was of wood, was a breach of the warranty, and the plaintiff cannot recover.

3d. That the obtaining a policy in the Lamar Fire Insurance Company, without giving notice thereof to the defendant and having the same indorsed on the policy or acknowledged by it in writing, avoided the policy in suit.

4th. That the acts of the plaintiff in proceeding to erect another building immediately after the fire, and pressing it forward towards completion without any suspension, in view of the election of the defendant to rebuild, and the notice given by it to the plaintiff to that effect, and the measures taken by it for rebuilding, preclude a recovery in the action.

5th. That it is proved the defendant and the other insurers of the property, according to their contracts of insurance, and within the time provided for by their contracts, gave notice to the plaintiff, in writing, of their intention to rebuild, and the plaintiff refused to and would not permit the defendant or the other insurers to do so. The refusal of the plaintiff was in express words, and also by himself, within the period allowed by the contract for the defendant to give notice, proceeding to erect a building, and pressing it forward towards completion without any suspension.”

The court granted the motion and ordered judgment of nonsuit, to which direction the counsel for the plaintiff excepted; and on motion of the plaintiff it was ordered that the case be heard in the first instance at the general term,

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before the entry of judgment, and that all proceedings be stayed until the hearing and decision at said term.

The plaintiff appealed.

*Smith & Lapham*, for the appellant.

*T. R. Strong*, for the defendant.

*By the Court*, E. DARWIN SMITH, J. The motion for a nonsuit in this action was based upon several grounds then specified. It is sufficient if it was properly granted upon any or either of such grounds. The chief point discussed here, and upon which the case doubtless turned at the circuit, was whether the plaintiff was entitled to maintain the action for the loss sustained by the fire, the defendant having claimed the right to rebuild under the policy, and having elected so to do. I think I should find no difficulty in sustaining the right of the plaintiff to recover upon all the other points made by the defendant on the trial. But as I do not see any way to avoid the objection that the defendant had the election to rebuild, I think it unnecessary to discuss any other question. The policy upon which the action is brought declares, expressly, in the body thereof, that the same is made and accepted in reference to the terms and conditions thereunto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties thereto in all cases not therein otherwise expressly provided for. Among other of the conditions annexed to said policy, in the 10th condition it is declared that, in case of any loss on or damage to the property insured, it shall be optional with the company to replace the article lost or damaged with others of the same kind and quality, and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention so to do, within thirty days after having received the preliminary proofs of loss required by the ninth article of the said conditions. Payment of losses shall be made in sixty days after the loss

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shall have been ascertained and proved. The fire occurred on the 11th of February, 1860. The proof of loss was served on the 17th of February on the defendant. On the 8th day of March thereafter the defendant served written notice upon the plaintiff, signed by its vice president, stating that the Home Insurance Company would avail itself of the condition of its policy which reserves the right to rebuild the Franklin House block, (the buildings in question,) insured to him under policy 117 of Canandaigua agency, that being the policy on which this suit is brought. I cannot see why this is not a sufficient and complete notice of the election of the defendant to restore the building destroyed by the fire, under the 10th condition annexed to the policy. It was given within the thirty days after service of the proof of loss. Condition 10, annexed to the policy, provided that it should be optional with the defendant to "rebuild or repair," &c. within a reasonable time, giving notice of its intention to do so within thirty days after receiving proof of the loss. This notice was explicit, and determined the option of the defendant. It was bound afterwards within a reasonable time to rebuild. This it assumed to do, and no action would lie to recover the amount of the loss sustained by the plaintiff from such fire, until the neglect of the defendant to comply with its offer and election to rebuild within such reasonable time. There is no basis made in their complaint, or in the evidence, for a recovery on this ground. On the contrary, it appears that the plaintiff refused to allow the defendant, with the other insurance companies interested in the subject, to enter upon the premises to rebuild; and it appears, besides, that the plaintiff had himself proceeded to rebuild, without waiting for the expiration of the thirty days within which the defendant was entitled to make such election.

The objection that the clause of condition 10, giving the defendant thirty days within which it should have the option to rebuild, is repugnant to the other part of said condition, in which it is stipulated that the company will pay

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the loss "within sixty days," &c. and the same is therefore void, is not well taken. The thirty days within which the defendant may elect to rebuild is included within the sixty days, and is simply an election to pay the loss in a particular way, i. e. in rebuilding, and is thus a provision for payment by rebuilding the premises, provided the defendant elects so to do within thirty days. If the company does not elect to repair or rebuild within thirty days, it loses the right to do so, and must pay absolutely in cash, and the insurance money is then due in sixty days from the time the loss is proved or ascertained.

The objection that there is no proof that Mr. Willmarth was authorized to give the notice in question, I think not well taken. He assumed to act as vice president of the defendant's company; and it was proved by Mr. Salisbury that he was such officer, and he was acting for and in behalf of the corporation, and his acts were not disavowed, but affirmed by subsequent acts of the corporation and in the defense of this suit.

The objection that the defendant could not alone, within the limit of the amount of the plaintiff's policy, rebuild the buildings destroyed, is not tenable. The company assumed to do so, and was bound to see such building repaired or restored, to absolve it from its liability to pay the \$4000 on its policy. It was its business to secure the co-operation, if need be, of the other insurance companies interested in the question, in the work of the reconstruction of the building in question. But it appears that all such companies met at Canandaigua, by representatives, and there determined to join in rebuilding, and so apprised the plaintiff, and served upon him a proposition by builders to rebuild the house consumed by the fire; and it was then represented to him that all of said insurance companies had contracted with the parties Kelsey & Wells, builders in Canandaigua of conceded responsibility, to rebuild the block destroyed by the fire. This was stated to him at the time, and in the presence and



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in behalf of representatives from all the insurance companies liable for losses sustained by such fire ; and subsequently, on the 27th of March thereafter, a written notice to the same effect was served on the plaintiff by Mr. Salisbury as attorney for all of such insurance companies. I cannot see, therefore, why the election by the defendant to rebuild, &c. was not absolutely made, in proper time ; and if this be so, the plaintiff certainly cannot maintain this action. The defendant having elected to pay his loss by restoring the building burned, they cannot be required to pay in any other way. This is the contract between the parties.

The case presents several exceptions in respect to the admission or rejection of evidence, but I do not see that any evidence was rejected that would have changed the plaintiff's case, or any admitted improperly, to his injury. The essential facts upon which the case turned at the circuit were clear and undisputed. The judge was not asked to submit any particular question to the jury, and I do not see how a new trial, if granted for the reception or rejection of evidence upon any ground specified in any of the exceptions could benefit the plaintiff. The fact is clear and palpable, upon the evidence, that the plaintiff, immediately after the fire, commenced the work of rebuilding, without waiting for the lapse of the thirty days within which the defendant had the option to rebuild ; that it made the election to rebuild within the thirty days, and was prevented by the plaintiff from doing so. I cannot see, upon these facts, how the plaintiff could have had a verdict at the circuit that could have been sustained. The contract of insurance is one of strict law. Each party stands upon his strict legal rights as declared in the contract. The conditions annexed to the policy of insurance were part of the contract, and bound both parties alike. I think the nonsuit was properly granted. The nonsuit would not have been proper if there was evidence which ought to have been submitted to the jury. A judgment of nonsuit assumes that there is no such evidence, or not suffi-

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cient to warrant a verdict upon any material issue in favor of the plaintiff. In granting a nonsuit the circuit judge necessarily, as a general rule, adjudges and decides that there is no such evidence; and when a nonsuit is granted, the plaintiff, if he has duly excepted to such decisions, is entitled to urge, upon the motion for a new trial, that the cause should have been submitted to the jury upon the whole case, unless the attention of the judge was called to some particular question of law, and the decision was expressly put upon some special ground, with the tacit consent of the counsel for the parties that such point was the controlling one in the case. In such event both parties would be deemed to have rested their case upon such questions, and it would be unfair to allow them to take other ground on the motion for a new trial. But that is not this case. The general exception taken here is sufficient to raise the question that the case, upon the whole evidence, should have been submitted to the jury. I think that a new trial must be denied.

[MONROE GENERAL TERM, March 8, 1862. *Welles, Johnson and Smith*, Justices.]

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McCLELLAND vs. REMSEN, Sheriff, &c.

There is an obvious distinction, in principle, between an assignment by a debtor of his property to trustees, upon trust for the payment of particular and specific debts, reserving the surplus to the debtor, and an assignment by a debtor of his property and effects to his creditor, upon the trust to sell and pay his own debt, reserving the surplus to the assignor.

The latter is in effect a mortgage, and when the debt which it is designed to secure is paid, the property reverts to the original owner.

When property is assigned and transferred to a creditor, to secure the payment of a debt, the surplus, without any special reservation in the deed, would revert to the assignor, the moment the debt was paid and the purpose of the conveyance accomplished. A special reservation can do no more, and is not evidence of a fraudulent intent.

Assignments of property upon trust to pay debts, giving preferences, have

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never been favored by the courts, and will only be upheld when they fulfill the conditions which the law finds it necessary to prescribe for the prevention of fraud.

Among these are, that the debtor shall devote all his property to the satisfaction of his debts, without condition or qualification; and that he shall reserve nothing from the assigned property, to himself, until all his creditors are paid.

He may prescribe the order in which payments shall be made, giving preferences to favored creditors; but if he reserves any part of the estate to his own use, or for the benefit of himself, in any way, until the debts of all his creditors are satisfied, the assignment will be adjudged fraudulent *per se*, and absolutely void.

Whether one partner can, without the assent of the other, make a general assignment of the copartnership effects to a trustee, for the payment of debts, giving preferences? *Quære.*

The authority of one copartner to sell the copartnership property to a particular creditor or creditors in payment of their debts has been judicially determined, and is now the settled law.

The power of a partner to dispose of the property of the firm extends to assignments of it as security for antecedent debts, as well as for all debts to be thereafter contracted on account of the firm.

And where a partner has assigned partnership property to a creditor of the firm, by an instrument in the nature of a mortgage, to secure an antecedent debt, the assignee will hold the property, as against a sheriff who levies on the same by virtue of an execution issued upon a judgment subsequently confessed by the other partner in the name of the firm.

THIS action was brought against the defendant, as sheriff of the county of Kings, to recover the value of certain goods, which had been seized by him upon execution. On the trial a motion was made for a nonsuit, which was denied; and the jury, under the direction of the court, rendered a verdict for the plaintiff, assessing the damages at \$394.55. Certain exceptions were taken, on the trial, which were ordered to be heard in the first instance at a general term of the court.

*James Troy*, for the plaintiff.

*N. F. Waring*, for the defendant.

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*By the Court*, BROWN, J. William McClelland and one Elizabeth Hasluck, the wife of — Hasluck, were copartners in the business of selling wines and liquors of various descriptions at the corner of Myrtle avenue and Pearl street, in the city of Brooklyn, under the name and firm of William McClelland & Co. The plaintiff, John McClelland, was a creditor of the firm, his debt being \$357, for goods sold and delivered. On the 2d of June, 1860, an instrument in writing was executed and delivered to the plaintiff, bearing date on that day, and purporting to be made between William McClelland and Elizabeth Hasluck, copartners under the name and firm of William McClelland & Co. of the first part, and John McClelland of the second part. It recited the existence of the debt for \$357 to John McClelland, their inability to pay it, and their willingness to assign the copartnership property for the benefit of the creditor. It then proceeds to assign over the goods, merchandise, accounts, choses in action and effects of the firm, to the plaintiff. Upon the trust to sell and convert into money, either at public or private sale, and to collect the debts and choses in action, pay all reasonable expenses and costs of executing the assignment, and with the residue pay the debt due to the plaintiff, of \$357, with the interest, and then to pay whatever may remain of such moneys, if any, to the parties of the first part to the said instrument. This paper was executed under seal by William McClelland, in the name of William McClelland & Co., but there was no evidence that Elizabeth Hasluck, the other partner, assented to it, or was made aware of its execution at the time. The plaintiff took the actual possession of the assigned property within a few days of the date of the instrument, and had such possession at the time the defendant or his officer made the levy hereinafter referred to. On the 20th of June, 1860, Elizabeth Hasluck confessed a judgment in this court to one William F. Howe, for the sum of \$605, which was duly docketed on the same day, and two days thereafter, an execution upon

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the same was put into the hands of the defendant, George Remsen, sheriff of Kings county, who seized and sold the goods in question, realizing therefrom, after deducting his fees, \$289.90. The plaintiff thereupon brought this action to recover the value of the goods, which was tried before Mr. Justice LOTT, at the Kings circuit, and where the foregoing facts appeared from the evidence. A motion was made upon the trial for a nonsuit, which was denied. The judge then directed the jury to find a verdict for the plaintiff. To which direction the counsel for the defendant excepted. The jury found a verdict accordingly for the sum of \$304.55, the amount of the indebtedness of William McClelland & Co. to the plaintiff, with the interest. The exception was ordered to be heard in the first instance at the general term.

The existence of the debt from the firm of William McClelland & Co. to the plaintiff was not disputed upon the trial. So that the relation of debtor and creditor between the parties to the deed of assignment was fully established. The cases distinguish—and there is an obvious distinction in principle—between an assignment by a debtor of his property to trustees, upon trust for the payment of particular and specific debts, reserving the surplus to the debtor, and an assignment by a debtor of his property and effects to his creditor, upon the trust to sell and pay his own debt, reserving the surplus to the debtor or assignor. The latter is in effect a mortgage, and when the debt which it is designed to secure is paid, the property reverts to the original owner. The surplus is always within the reach of the other creditors, and can, by a creditor's bill or proceedings supplementary to the execution, be attached and appropriated to the payment and satisfaction of their debts. Such a disposition of a debtor's estate is therefore free from the weightiest objections against assignments upon trust to third persons for the payment of debts. There is no trustee interposed between the creditors and the property of their debtor. The assignee does not acquire the entire legal interest in the property conveyed

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subject to the trust, but a specific lien upon it; and the property is still subject to the process of the courts, and may, subject to the mortgage creditor, be devoted to the satisfaction of the other creditors' debts. When property is assigned and transferred to a creditor to secure the payment of a debt, the surplus, without any special reservation in the deed, would revert to the assignor the moment the debt was paid and the purpose of the conveyance accomplished. A special reservation can do no more, and is not evidence of a fraudulent intent. The law regards mortgages and grants and conveyances in the nature of mortgages to secure antecedent debts, with no disfavor, and under proper limitations as to possession and notoriety, they are constantly upheld. Assignments of property upon trust to pay debts, giving preferences, have never been favored by the courts, and will only be upheld when they fulfill the conditions which the law finds it necessary to prescribe for the prevention of fraud. Among these are, that the debtor shall devote all his property to the satisfaction of his debts, without condition or qualification, and that he shall reserve nothing from the assigned property to himself until all his creditors are paid. He may prescribe the order in which payments shall be made, giving preferences to favored creditors; but if he reserves any part of the estate to his own use, or for the benefit of himself in any way, until the debts of all his creditors are satisfied, the assignment will be adjudged fraudulent *per se*, and absolutely void. For authority as to one class of these cases, see *Goodrich v. Downs*, (6 Hill, 438;) *Barney v. Griffin*, (2 Comst. 365.) And for authority as to the other class, see *Leitch v. Hollister*, (4 Comst. 211.) In the latter case the court, in speaking of assignments made to creditors themselves for the purpose of securing their own debts, say: "The conveyance, whatever may be its form, is in effect a mortgage of the property transferred. A trust as to the surplus, results from the nature of the security, and is not the object, or one of the objects, of the assignment.

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Whether expressed in the instrument or left to implication is immaterial." In view of these authorities, there is nothing vicious or illegal in the form of the instrument under which the plaintiff claims to recover the value of the property.

The remaining question in the case arises upon the power of one partner to assign over and transfer to a creditor the partnership effects in payment of, or as security for, the payment of his debt. Elizabeth Hasluck did not unite in, or assent to, the executing of the deed of assignment, but it was the act of William McClelland, solely. It cannot escape notice, in this connection, that while the plaintiff claims the property under an instrument made in the name of the firm, by one copartner, the defendant claims to hold it under an execution issued upon a judgment confessed by the other copartner. Still the legal problem remains to be solved by the aid of principle or authority. The right of one partner to make a general assignment of the copartnership effects to a trustee, for the payment of debts, giving preferences, has been denied by very competent and respectable authority, and probably does not exist. It may still be regarded as an open question, not having yet passed the ordeal of the court of last resort in this state. But the authority of one copartner to sell the copartnership property to a particular creditor or creditors in payment of their debts, has been judicially determined, and is now the settled law. The power of a partner to dispose of the property of the firm extends to assignments of it as security for antecedent debts, as well as for debts thereafter to be contracted on account of the firm. Lord Mansfield, in a celebrated case, (*Fox v. Hanbury*, Cowp. 445,) decided that even after an act of bankruptcy committed by one partner, an assignment bona fide of partnership effects by the solvent partner to a creditor of the firm, in payment of his debt, was binding on the firm. (*Collyer on Partnership*, 395.) *Mabbett v. White* (2 Kern. 442) decides that one copartner has authority to sell and transfer all the copartnership effects directly to a creditor of

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the firm in payment of a debt, without the knowledge or consent of his copartner, although the latter is at the place of business and might be consulted. Nor is the validity of the sale affected by the insolvency of the firm at the time and the preference which the purchasing creditor will thus acquire over the others. If I am right in thinking the instrument of assignment made by William McClelland in the name of the firm, to the plaintiff, a mortgage, or an instrument in the nature of a mortgage, then it is within the principle of the decisions referred to, and is effectual to pass the title to the goods, for all the purposes of this action, to the plaintiff.

Judgment should be entered upon the verdict for the plaintiff.

[DUTCHESS GENERAL TERM, May 12, 1862. *Emott, Brown, Scrugham and Lott*, Justices.]

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SANDS, Receiver, &c., *vs.* ST. JOHN, impleaded with Birdsall.

Under the code of procedure, the objection that the action, whether it be equitable or legal, was not commenced within the time limited by statute, can only be taken by *answer*. The defendant cannot *demur*, on that ground, even where it appears on the face of the complaint, that the cause of action is barred by the statute of limitations.

Hence it is unnecessary for the plaintiff to allege, in his complaint, any facts or circumstances to anticipate or avoid the defense of the statute of limitations.

It is only every *material* allegation of the complaint, not controverted by the answer, that is to be taken as true. Accordingly, where, in an action by the receiver of a mutual insurance company, on a stock note, it was alleged, in the complaint, that the company and the receiver were restrained by injunction, for about five years, from bringing any action on the note in suit, it was *held* that the allegation, being immaterial, could not be taken as true by reason of the omission of the defendant to deny it; and that it was therefore unnecessary for the defendant to accompany the defense of the statute of limitations with a denial of the allegation.

Where a promissory note, on its face, is payable at such time or times as the directors of a mutual insurance company may, agreeably to their charter



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and by-laws, require, the presumption is that it was given and taken as and for a premium or deposit note ; and no recovery can be had on such a note, unless it has been duly assessed.

But the plaintiff may allege and prove that the note, notwithstanding its form, was given and taken as and for a capital stock note, and used as such in organizing the insurance company, and recover the whole amount thereof, without showing that it has been assessed ; such notes being payable absolutely, at maturity.

Actions on capital stock notes must be brought within six years next after the causes of action accrue thereon.

An action may be commenced on such a note, without any actual request, or demand of payment, at the expiration of twelve months, or twelve months and three days, from its date ; and the statute of limitations will then commence running, on the same.

THIS case came before the court on an appeal from an order made at the Delaware special term, held by Justice BALCOM, in May, 1861, overruling the plaintiff's demurrer to the fourth defense set up in the defendant's answer. The action was brought by the plaintiff, as receiver of the *Ætna Insurance Company of Utica*. There were two counts or claims in the complaint. But each was based upon a promissory note, in the following words and figures, viz :

“ \$420. For value received in policy No. 239, dated the 28th of March, 1851, issued by the *Ætna Insurance Company of Utica*, we promise to pay the said company, or their treasurer for the time being, the sum of four hundred and twenty dollars, in such portions, and at such time or times, as the directors of said company may, agreeably to their charter and by-laws, require.”

(Signed)

ST. JOHN & BIRDSALL.”

The complaint showed that the insurance company became insolvent, and that the plaintiff had been appointed receiver of its property and effects.

The allegations in one count or claim in the complaint showed the note was a capital stock note, and that it was given for, and received and used as such, in organizing the insurance company. The allegations in the other claim or count in the complaint showed that the note was a premium

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or deposit note, and that it had been assessed as such for losses sustained by the insurance company by reason of fires.

The defense, to which the plaintiff demurred, was as follows: "Fourth. And for a further and separate answer to said complaint, this defendant alleges that neither of the causes of action set forth in said complaint accrued within six years next preceding the time of the commencement of this action, and that said action was not commenced within six years next after the said causes of action and each of them accrued, and that the plaintiff is therefore barred by the statutes of this state concerning the time of commencing civil actions, from having or maintaining this action against this defendant; and this defendant, in his answer, sets up the said statute in bar of a recovery against him in said action, on account of the causes of action set forth in said complaint, or either of them. Wherefore this defendant prays for judgment against the plaintiff for his costs and disbursements in this action."

The complaint contained allegations showing that the plaintiff was restrained by injunction from bringing any action on the note for about five years, and other allegations to meet or avoid the defense of the statute of limitations, if it should be set up in the answer.

The plaintiff demurred to said fourth defense, being the defense of the statute of limitations, on the following grounds, to wit: "1. That the same does not constitute a defense to said action. 2. That the same is no answer, and not applicable to the action. 3. That the defendant's note is capital stock, and is not yet subject to the statute of limitations."

The conclusions of law found by Justice BALCOM, at the special term, were as follows, viz: "I find and hold that the fourth defense set up in the answer contains new matter, which, upon its face, constitutes a defense to this action; and that the plaintiff's demurrer to said defense is not well taken, and it is overruled with costs; but the plaintiff may withdraw said demurrer within twenty days after service of a

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copy of this decision on his attorney, on payment of the costs occasioned by said demurrer."

The appeal was argued by

*Henry R. Mygatt*, for the plaintiff.

*J. W. Gott*, for the defendant.

BALCOM, P. J. The defense of the statute of limitations in this case is set up in nearly the same form that such defense was interposed in actions at law under our former system of pleading. (*See 2 Chit. Pl. 450; Bell v. Yates, 33 Barb. 627.*) But that system was abolished in 1848, when the code of procedure was enacted. (*Laws of 1848, p. 497.*) The system of pleading prescribed by the code is *sui generis*, though more like that which formerly prevailed in courts of equity than any other.

Under the old system the plaintiff had no right, in an action at law, to allege facts in his declaration to head off or avoid an anticipated defense, such as the statute of limitations; and if he did so, such facts were treated as surplusage, in case they did not subject the declaration to the charge of duplicity. (*See 1 Chit. Pl. 228 to 235.*) Under that system, in an action at law arising on contract, to which *prima facie* the statute of limitations was a defense, and the plaintiff relied on a new promise of the defendant within the time limited, to avoid such defense, he declared upon the original contract without noticing the new promise. (*See 5 Wend. 257; 9 id. 293; 6 Barb. 583.*) And under the code the action is founded on the original obligation; and if the statute of limitations is set up in the answer, as a defense, any matter in avoidance of it may be proved without being alleged in the complaint. (*Esselstyn v. Weeks, 2 Kern. 635. Waltermire v. Westover, 4 id. 20, 21.*) This court is not at liberty to hold (whatever may be the opinion of its members) that the new promise is the substantive cause of action, and that the original contract is only to be looked to for the con-

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sideration to sustain such promise. The decision of the superior court in 2 *Duer*, 609 and 626, (section 110 of the code,) the remarks of *Van Santford* in the second volume of his *Treatise on Pleadings*, (2d ed. pp. 268, 269,) and the reasoning of Judge Bronson in *Van Keuren v. Parmelee*, (2 *Comst.* 523,) would not justify this court in disregarding the decisions of the court of appeals, above cited from 2d and 4th *Kernan's Rep.* We are therefore compelled by authority to declare the law to be, that where there is a new promise to pay a debt barred by the statute of limitations, it is not necessary to count upon this as a new contract; but the action may be brought upon the original obligation. (See 4 *Kern.* 21.)

Before the code, when the action was cognizable only by a court of equity, and was apparently barred by the statute of limitations, the complainant was not only required to set out in his bill the original cause of action, but was obliged to allege facts or circumstances therein sufficient to avoid the effect of the statute, and show that it was not a defense to the action, or the bill could be demurred to for the want of equity. (See *Story's Eq. Pl.* § 751; 24 *Wend.* 587; 3 *Barb. Ch.* 477; *Van Hook v. Whitlock*, 7 *Paige*, 373.) And it was then well settled that a plea in bar, of the statute of limitations, to a bill in equity, was bad, unless it contained a general denial of the facts and circumstances charged in the bill, which would avoid the statute, and was accompanied by an answer supporting it, by a particular denial of all such facts and circumstances. (See *Goodrich v. Pendleton*, 3 *John. Ch.* 384; *Kane v. Bloodgood*, 7 *id.* 134; *Bogardus v. Trinity Church*, 4 *Paige*, 195; 1 *Barb. Ch. Pr.* 128, 129; *Chapin v. Coleman*, 11 *Pick.* 331; *Stearns v. Page*, 1 *Story's R.* 204; *Story's Eq. Pl.* § 754; *Clayton v. Winchelseu*, 3 *Younge & Collyer's R.* 683; *Foley v. Hill*, 3 *Myl. & Craig's R.* 475.) The reason for requiring the defendant to deny in his plea and by his answer the facts and circumstances charged in the bill, which would avoid the statute, was, that the court would intend that the matters so charged against

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the defendant were true, unless they were fully and clearly denied, (*see* 3 *John. Ch. R.* 391; 1 *Barb. Ch. Pr.* 129;) and when such matters were not thus denied, it was held that the bill furnished a perfect answer to the plea.

I have no doubt that, by the code, the objection that the action, whether it be equitable or legal, was not commenced within the time limited, can only be taken by answer; for such is the plain and obvious import of section 74. (*See Lefferts v. Hollister*, 10 *How. Pr. R.* 383; *Butler v. Mason*, 16 *id.* 546.) The decision in *Genet v. Tallmadge*, (1 *Code R., N. S.* 346,) that, in an equitable action, where it appears on the face of the complaint that the cause of action is barred by the statute of limitations, the defendant may demur to the complaint, was virtually overruled in *Butler v. Mason*, (*supra.*) I think the decision in *Genet v. Tallmadge* is contrary to the plain reading of § 74 of the code, and that it should not be followed. The views of *Van Santford*, founded upon this decision, must be discarded with it.

It follows, from the foregoing conclusions, that it was unnecessary for the plaintiff to allege any facts or circumstances, in his complaint, to head off or avoid the defense of the statute of limitations. Besides, subdivision 2 of section 142 of the code declares that the complaint shall contain "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition." And I take it to be clear that unnecessary allegations in a complaint are immaterial, and may be stricken out on motion as irrelevant or redundant. (*Code*, § 160.) Justice CLERKE held, in *Butler v. Mason*, (*supra.*) that it is irrelevant to insert an allegation in a complaint that the defendants have not resided at any time in the state within six years before the commencement of the action, for the purpose of anticipating the defense of the statute of limitations; although the complaint would show on its face, without such allegation, that the claim was barred by the statute. I think that decision is in harmony with the spirit as well as the letter of the code, and

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that we should follow it. That decision is plainly in conflict with the one made by Justice Smith, in *Bracket v. Wilkinsons*, (13 *How. Pr. R.* 102;) and I think the latter should be overruled. (*See 8 How. Pr. R.* 470.) It will hardly do to hold that unnecessary allegations in a pleading are not irrelevant or redundant, as we must if we follow the decision in *Bracket v. Wilkinsons*.

Now, as the allegations connected with the second claim or cause of action set out in the complaint, showing that the insurance company and the receiver, Eames, were restrained by injunction, about five years, from bringing any action on the note in suit, were immaterial, they cannot be taken as true, for the omission of the defendant to deny them by force of section 168 of the code. It is only every *material* allegation of the complaint, not controverted by the answer, that is to be taken as true. It was therefore unnecessary for the defendant to accompany the defense of the statute of limitations with a denial of the above mentioned allegations, to prevent the court taking them as true.

This claim or cause of action shows the note therein mentioned is a premium or deposit note. Hence the defendant would have the right to prove it was given for a policy which ran only one year, and that it was duly assessed by the directors of the company in 1852 or 1853, for a portion of all the losses and expenses for which the plaintiff had assessed it, and that in one of those years, or at least more than six years prior to the time the action was commenced, payment of the assessment made in 1852 or 1853 was duly demanded of the defendant, and refused. These facts would render the defense of the statute of limitations applicable to such claim or cause of action, and would compel the plaintiff to give evidence to avoid it.

I think no one can doubt that an action to recover an assessment upon a premium or deposit note must be brought within six years next after the assessment is made, and payment thereof demanded, unless facts exist to prevent the

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running of the statute of limitations, or to avoid its effect. (*Code*, § 91.)

The foregoing reasons lead to the conclusion that the defense that the several causes of action in the complaint did not accrue within six years next preceding the time the action was commenced, is well pleaded as a bar to the second claim or cause of action therein set out, without being accompanied by a denial of the allegations inserted in the complaint to avoid or head off such defense.

The allegations in the first claim or cause of action set out in the complaint, that the note therein described is a capital stock note, and was used as such in effecting the organization of the *Ætna Insurance Company*, are material and necessary, for the reason that there is no averment therein that the note has been assessed as a premium or deposit note, and it is in the form of such notes. The note, on its face, is payable at such time or times as the directors of the *Ætna Insurance Company* might, agreeably to their charter and by-laws require, and the presumption, without any allegation or proof to the contrary, would be, that it was given and taken as and for a premium or deposit note, (*Dana v. Munson*, 23 *N. Y. Rep.* 564;) and no recovery can be had on such a note unless it has been duly assessed. (19 *N. Y. Rep.* 32.) But the plaintiff may allege and prove that the note, notwithstanding its form, was given and taken as and for a capital stock note, and used as such in organizing the insurance company, and recover the entire amount thereof, without showing that it has been assessed; because such notes are payable absolutely, at maturity. (*White, rec'r, v. Haight*, 16 *N. Y. Rep.* 310.)

There is nothing on the face of the note, as it is described in this claim or cause of action, or on the face of a capital stock note made in the very words of the statute, to show that actions thereon need not be brought within six years next after the causes of action accrue. On the contrary, it seems to me to be plain, that by section 91 of the code, actions on such notes must be brought within six years next after the causes

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of action accrue thereon; and I do not think any statute concerning insurance companies, in which such notes are mentioned, extends the time for commencing actions on them.

Now, as all capital stock notes of mutual insurance companies must be made payable, or be deemed payable, "at the end of or within twelve months from date thereof," (*Laws of 1849, p. 442, § 5,*) I think they become due absolutely, (saying nothing about days of grace thereon,) at the expiration of twelve months from their dates, without any requirement of payment by the directors.

If the language of the note in suit had been, that the defendant promised to pay the directors of the *Ætna Insurance Company* the money therein mentioned, "at the end of or within twelve months from the date thereof," I should say there could be no doubt that it became due and payable at the expiration of that period, and that the statute of limitations then began to run on it. And if the defendant gave the note as and for a capital stock note, the law presumes he had knowledge of the statute, pursuant to which he gave it; and he should be deemed to have known that the directors of the company could require him to pay a portion or all of it within twelve months from its date; but if they did not require him to pay the same within that period, it became due and payable absolutely, by force of the statute, at the expiration of such period. I therefore think, if the note is a capital stock note, it became due and payable absolutely, (saying nothing of days of grace thereon,) at the expiration of twelve months from its date, precisely as it would have done if the time of payment had been stated therein in the very words of the statute.

If these views are correct, an action could have been commenced on the note without any actual request or demand of payment, at the expiration of twelve months, or twelve months and three days from its date, (8 *Cowen*, 271; 3 *Wend.* 13; 9 *John.* 217; 16 *N. Y. Rep.* 451;) and the statute of limitations then commenced running on the same.



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But if the note could be deemed payable on demand, or when payment thereof should be required after the expiration of twelve months from its date, it was due and payable when given, or as soon as the twelve months elapsed, and the statute of limitations began to run on it when it became due and payable; for an action could then have been commenced on it by the holder without first actually demanding payment of it of the defendant; the bringing of the action would have been a sufficient demand. (2 *Parsons on Con.* 2d ed. 370 to 374; 13 *Wend.* 267; 3 *Denio*, 12.) The authorities which sustain this conclusion were not overruled or repudiated in *Merritt v. Todd*, (23 *N. Y. Rep.* 28,) but are entirely consistent with that case. And I do not doubt that the law now is, as it always has been, that the statute of limitations begins to run on a note, payable on demand, as soon as it is made. (See 2 *Parsons on Cont.* 2d ed. 372.)

I will not further discuss this branch of the case; but will remark that my views of it harmonize with the opinion of the general term of this court, delivered in the fourth district, in *Bell v. Yates*, (33 *Barb.* 627,) and substantially agree with those expressed by Justice ALLEN in a dissenting opinion in *Howland v. Edmonds*, (*Id.* 433.)

I might add, that it seems to me prudence and sound policy require that the capital stock notes of mutual insurance companies should be paid or collected within less than seven years from their dates, and "invested in more safe and permanent securities, according to the provisions of the 8th section of the act of 1849." (See 16 *N. Y. Rep.* 322; *Laws of* 1849, p. 444, § 8.)

I think I have shown that the six years statute of limitations is applicable to capital stock notes of mutual insurance companies; and if so, it is properly pleaded as a defense to the first claim or cause of action set out in the complaint.

I can see no objection to the defendant proving, in support of the defense of the statute of limitations, if necessary,

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that the insurance company requested him to pay his note as part of the capital stock of the company, and that he refused to do so, more than six years prior to the time the action was commenced; and if such a state of facts should be established, the six years statute would be a bar to the first claim or cause of action in the complaint, unless my brethren shall hold that no statute of limitations runs on the capital stock notes of a mutual insurance company during the existence of its charter or the time it does business; which I do not think can be done without putting an unwarrantable construction upon the statutes concerning such notes and companies.

I will also remark, that the plaintiff can only demur to an answer containing new matter, where, *upon its face*, it does not constitute a counter-claim or defense, (*Code*, § 153,) and that a demurrer admits the allegations in the pleading demurred to are true; and that the demurrer in this case admits that neither claim or cause of action set out in the complaint accrued at any time within six years next before the time the action was commenced.

For the foregoing reasons, I am of the opinion the decision of the special term, overruling the demurrer to the fourth defense contained in the answer, should be affirmed, with costs.

Since writing the foregoing opinion, I have learned that the court of appeals in April last decided, in *Howland v. Edmonds*, that notes in the form of premium notes, given and taken as and for capital stock notes, and used as such in organizing a mutual insurance company, are payable on demand, and that the statute of limitations begins to run thereon from their dates.

PARKER, J. It has been recently decided by the court of appeals, in the case of *Howland, receiver, &c. v. Edmonds*, that the statute of limitations may be set up as a defense to an original stock note, like the one in question.

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The plaintiff's counsel, however, insists that the allegations in the complaint, showing that the receiver was restrained from collecting the notes of the company by injunction, bring this case within the following provision of the statute, (*Code*, § 105 :) "When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action;" and that those allegations forming part of the plaintiff's case, the answer that the cause of action *did not accrue* within six years, does not go far enough to constitute a defense, inasmuch as the complaint shows that, notwithstanding such fact, the plaintiff is still entitled to recover, and therefore that the demurrer to the answer is well taken.

I am of the opinion that the commencement of an action upon the note in question was stayed by injunction, within the meaning of the statutory provision above quoted, as shown by the facts set forth in the complaint. The receiver was as effectually restrained from bringing an action upon the note, as though the injunction had been obtained in an action brought by this defendant against him. Being the officer of the court, he could be restrained by its order made in the suit in that behalf mentioned, from collecting any of the notes of the company. The injunction set forth in the complaint being operative, therefore, as to this note, the case is brought within the letter of the statute, and I think clearly also within its intent.

But the chief question upon this point is, whether the setting up of the injunction in the complaint made it necessary for the defendant, in his answer of the statute of limitations, to deny the allegations showing the injunction, or to confess and avoid them. If the allegations respecting the injunction are properly in the complaint, then it is evidence that the answer is defective. The 142d section of the code prescribes, so far

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as facts are concerned, that the complaint shall contain "a plain and concise statement of the facts *constituting a cause of action*, without unnecessary repetition;" and section 160 provides that if "redundant matter be inserted in a pleading, it may be stricken out on motion of the party aggrieved thereby." It would seem that the rule of pleading, under the code, restricts the plaintiff to a statement of the facts necessary to constitute a cause of action, and that whatever is stated more than this is to be stricken out as redundant.

It was not necessary for the plaintiff to set up that the commencement of an action on the note had been stayed by an injunction, to make out his cause of action, (2 *Kern*. 635;) and hence it seems to me that those allegations are redundant, and would be stricken out. I know that Mr. Justice SMITH, in an analogous case, held, at special term, that a plaintiff may in his complaint anticipate the defense, and allege matters in answer thereto; remarking that "a plaintiff must be allowed some latitude in stating his case in his complaint, which is to follow the form of pleading in practice in equity, rather than at law." (13 *How*. 102.) Mr. Justice Harris, on the contrary, held in an equity case, that such pleading is not allowable under the code; and when the plaintiff set up matter intended to meet and avoid an anticipated defense, "as a kind of replication in advance," he struck it out as redundant, and held that "the plaintiff is to state the facts which constitute his cause of action, and nothing more." (8 *How*. 470.) This seems to me better to consist with the requirements of the code than the case in 13 *Howard*; and I conclude that the allegations in question are not properly in the complaint; and being *immaterial* as a portion of the complaint, it was not incumbent on the defendant either to deny or avoid them in his answer, and they do not stand admitted by his omission to do so. (*Code*, § 168.)

It follows that an answer is not defective in omitting to

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notice those allegations, and does, notwithstanding them, constitute a defense to the action.

The order overruling the demurrer was right, and should be affirmed.

CAMPBELL, J. concurred.

Order affirmed, with costs.

[BROOME GENERAL TERM, May 18, 1862. *Balcom, Campbell and Parker*, Justices.]

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FREER and HURD, Executors, &c. of Freer, and JOHN T. DURKEE, vs. STOTENBUR.

A tenant for life, or for years, or for a single year, has the right to work a mine or quarry that has been worked and is open at the commencement of his tenancy ; for it has become the mere annual profit of the land.

A lease, in general terms, of the land in which an open mine exists, carries the right to the lessee to work the same.

And the right of action for quarrying and taking away the stone from an open quarry is vested in the lessee named in the lease of such quarry, or whoever has his interest in it.

THIS action was brought to recover the value of a quantity of stone, that the defendant quarried and took from a piece of land, situated within the corporate boundaries of the village of Havana, in the county of Schuyler. The action was tried before a referee, who decided that the plaintiffs were entitled to recover the sum of \$629.06 as damages. Judgment was entered upon the decision, in favor of the plaintiffs ; and the defendant appealed therefrom to the general term of the court. The other facts, necessary to a correct understanding of the points decided by this court, are contained in the following opinion.

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*E. H. Benn*, for the plaintiffs.

*George Sidney Camp*, for the defendant.

*By the Court*, BALCOM, P. J. The plaintiffs claimed title to the land, from which the stone in question was quarried, under Samuel Watkins, deceased, who leased it to John T. Durkee and Asher S. Durkee, for the term of twenty years, from the first day of April, 1839, by an instrument in writing under seal, bearing date the 30th day of January in that year. The lease had not expired, and was in full force, when this action was commenced. But the plaintiffs did not claim to recover under or by virtue of any right granted by the lease, although one of them was one of the lessees named in it, and the assignee of the interest therein of his co-lessee. That plaintiff, as such lessee and assignee, had sued the defendant for taking and carrying away the stone, but recovered only nominal damages in such suit. The quarry, from which the stone was taken, had been worked and was open when the lease was made, and also when it took effect.

The defendant made the point, at the trial, that the lease transferred the right to the lessees to work the quarry and dispose of the stone taken therefrom, although one hundred and twenty-five acres of land was demised by the lease, and the quarry was not mentioned in it; and he also insisted that no person, except the lessees, or some one claiming through or under them in virtue of the lease, could maintain an action against the defendant for quarrying and carrying away the stone.

I am of the opinion these points were well taken. A tenant for life, or for years, or for a single year, has the right to work a mine or quarry that has been worked and is open at the commencement of his tenancy; for it has become the mere annual profit of the land. (*See 5 Coke's R.* 12; *1 Cowen*, 468, 474; *Taylor's Landlord and Tenant*, 165; *1 Platt on Leases*, 21; *Woodfall's Landlord and Tenant*, by Harri-

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son, 463; *Willard's Eq. Jur.* 373.) If the mine or quarry be not open, the tenant cannot work it, unless the right to do so is expressly granted by the owner of the reversion. But when it is open, a lease of the land, in which it exists, in general terms, carries the right to the lessee to work the same.

Neither of the plaintiffs was in possession of any portion of the 125 acres of land, except Durkee, at the time the stone was quarried and taken therefrom by the defendant; and I think the evidence shows that Durkee did not then have possession of the quarry; but that the defendant was then in the actual possession thereof under a person who claimed title thereto adverse to the plaintiffs. If I am right in this conclusion of fact, there is authority for saying that the plaintiffs were not entitled to recover. (*See MS. opinion of Justice Gray in this cause, when it was before the general term the first time; also see 19 Barb. 560.*)

But I shall not place the decision on that ground. I shall hold that the plaintiffs were not entitled to recover, for the reason that the right of action for quarrying and taking away the stone was vested in the lessees named in the lease, or whoever had their interest in it.

It follows, that the judgment in the action should be reversed and a new trial granted, costs to abide the event.

Decision accordingly.

[BROOME GENERAL TERM, May 13, 1862. *Balcom, Campbell, Parker and Mason, Justices.*]

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**WHITBECK *vs.* THE NEW YORK CENTRAL RAIL ROAD COMPANY.**

In an action to recover damages for the destruction by fire, of fruit trees, through the negligence of the defendant, it is proper for the judge to instruct the jury that the plaintiff is entitled to recover the value of the trees, as they stood upon his land at the time of the fire, if he is entitled to recover at all; and to refuse to charge that the plaintiff can only recover the diminished value of the land since the destruction of the trees.

The true rule of damages is, that if the thing destroyed, although it is part of the realty, has a value which can be accurately measured and ascertained, without reference to the value of the soil on which it stands, or out of which it grows, the recovery must be for the value of the thing thus destroyed, and not for the difference in the value of the land before, and after, such destruction.

It makes no difference, in this respect, whether the action is brought to recover for the destruction of a single tree, or all the trees in an orchard.

There is no intrinsic difficulty in estimating the value of a fruit tree, growing upon land, although it has, strictly, no market or commercial value, as a tree, independent of the land which sustains it.

Such value can be determined by the opinions of competent witnesses, as well as in the case of trees which are usually converted into timber, or fire wood.

To authorize a witness to give his opinion as to the value of fruit trees, it is not necessary that he should actually have seen, or been familiarly acquainted with, the trees in question. It is enough that he is acquainted with the fruit business in that neighborhood, and the value of similar property there.

After hearing from other witnesses what kind of trees they were, and the quality and amount of fruit yielded by them, generally, he is competent to express an opinion in respect to the value of the trees.

**A**PPEAL from a judgment entered at a special term, after a trial at the circuit. The action was brought to recover the damages sustained by the plaintiff by reason of the burning of his clover field and destroying his apple trees, in consequence of the carelessness and negligence of the defendant. It was proved that the fire originated at the track of the defendant's rail road in Pittsford, and was caused by the dropping of coals from the locomotive, upon the dry grass on the track. The plaintiff was examined as a witness, on his own behalf, and testified to the number and character of the fruit



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trees destroyed, and the quantity and value of the fruit produced by them the previous year, &c. After which, William H. Cook was sworn as a witness on the part of the plaintiff, and testified as follows: "I reside at Pittsford; I am a nurseryman; I am acquainted with the fruit business generally in this vicinity; I heard the testimony of the first witness in relation to the kind and quality of his apple trees hurt by this fire." Question. "What is the value of the trees?" Objected to by the counsel for the defendant, on the ground that the trees were part of the real estate, and because the witness had no personal knowledge of the trees. The objection was sustained and the plaintiff's counsel excepted. Subsequently this witness, on being recalled, testified as follows: "I presume I saw the orchard during its existence, but I have no recollection of it; I am acquainted with the land and the location; I think I am also acquainted with the value of land in that vicinity."

Question. Tell us what, in your opinion, these trees were worth upon that land? Objected to by the defendant's counsel. Question. What would be the value of these trees, set as early as 1838, grafted to the ordinary varieties of fruit, in that locality? Objected to by the defendant's counsel, on the ground that the trees were part of the real estate, and the true measure of damages, so far as the destruction of the trees was concerned, was the difference in value of the lot, as a whole, in which the trees grew, before and after the fire; and also because the witness had no knowledge in regard to these particular trees. The court overruled the objection, and the defendant's counsel excepted.

Answer. "It depends upon the kind; I should think about \$20 per tree; the way I estimate property, generally, is, what per centage it will pay over and above expenses; and trees of the age described, with six years' heads upon them, would pay from year to year the interest of more than \$20 a year; the fruit would be worth about 75 cents per barrel."

When the plaintiff rested, the defendant moved for a non-

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suit, on the ground that no negligence on the part of the defendant had been shown. The motion was denied, and the defendant's counsel excepted.

The judge charged the jury, among other things, that in arriving at the value of the damage, they were to use their own judgment upon all the evidence, and assess the value of the property destroyed. The counsel for the defendant requested the court to charge as follows: That, as to the question of damages in regard to the trees, the true rule of damage is, how much less was that orchard lot worth after than before the fire. The court refused so to charge, and the counsel for the defendant excepted. The judge told the jury if the plaintiff was entitled to recover for the trees, he was entitled to their value, on that land, at the time they were destroyed, together with interest on such value from the time they were destroyed. To this the defendant's counsel excepted. The jury returned a verdict for the plaintiff for the sum of \$650.

The defendant appealed.

*H. R. Selden*, for the appellant.

*W. C. Rowley*, for the respondent.

*By the Court*, JOHNSON, J. The only question in this case, of any importance, is in respect to the damages which the plaintiff was entitled to recover for the fruit trees destroyed by the fire. I am of the opinion that the judge at the circuit was clearly right in instructing the jury that the plaintiff was entitled to recover the value of the trees, as they stood upon his land, at the time of the fire, if he was entitled to recover at all. The object of an action of this kind is to obtain compensation for an actual loss; and this end is perfectly attained when the value of the thing destroyed is recovered by the owner. The defendant's counsel requested the judge to instruct the jury, that the plaintiff

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could only recover the diminished value of the orchard lot, by reason of the destruction of the trees. This the judge refused, and I think rightly. It is true that the trees in question were real estate, and in one sense part and parcel of the land itself. But so are buildings, and fences, and grass, and trees of all kinds while growing upon the land. The true rule I conceive to be this: that if the thing destroyed, although it is part of the realty, has a value which can be accurately measured and ascertained, without reference to the value of the soil in which it stands, or out of which it grows, the recovery must be for the value of the thing thus destroyed, and not for the difference in the value of the land before and after such destruction. And it can make no difference, in this respect, whether the action is brought to recover for the destruction of a single tree, or all the trees in an orchard. There is no intrinsic difficulty, as I conceive, in estimating the value of a fruit tree growing upon land, although it has strictly no market or commercial value, as a tree, independent of the land which sustains it. In this respect, however, it does not differ materially from buildings and other fixtures. But it does differ from trees which are usually converted into timber, or fire wood, and which are frequently sold as they stand, for that purpose, or nursery trees which are grown for market. The difference is this: In the one case the value consists chiefly in the thing itself, as a convertible and marketable commodity, while in the other, the value consists chiefly in the quality and quantity of its average annual products, and it is capable of being leased, as much as a field or a dwelling. The calculation by which the value would be determined in the two cases would be somewhat different, but, for aught I can see, it could be determined by the opinion of competent witnesses in the one case as well as the other.

The objection to proving the value of the trees in question by the opinion of the witness Cook, was not, I think, well taken, if the witness was competent to give an opinion

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upon the subject. It was objected, by the defendant's counsel, that the witness had no knowledge of these particular trees, and was therefore incompetent, even if opinion was competent evidence by which to establish value.

The witness was shown, I think, to be qualified to express an opinion on the subject. He lived in the same town, was a nurseryman, and well acquainted with the fruit business, and had heard the plaintiff testify in relation to the kind, quality and product of the trees, but had no particular recollection of the orchard, although he thought he had seen it. It was not necessary that he should actually have seen, or been familiarly acquainted with, the trees in question. It was enough that he was acquainted with the fruit business in that neighborhood, and the value of similar property there. He was, I think, as competent to express an opinion in respect to the value of the trees, after learning from other witnesses what kind of trees they were, and the quality and amount of fruit yielded by them generally, as he would have been to express an opinion as to the value of the fruit per barrel after ascertaining its condition and quality. The opinion, perhaps, would not be as satisfactory in the one case as the other, but if it was competent as evidence, that is enough.

I am of the opinion that there was no error either in the charge, or in the refusal to charge, as requested, or in the rulings upon the trial, and that the judgment should be affirmed.

[MONROE GENERAL TERM, June 2, 1862. *Johnson, Welles and Campbell, Justices.*]

MARSH *vs.* HOWE.36 649  
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An agreement by a borrower, to pay a subsisting debt of his own, in consideration of a new credit, or a further loan, is not usurious, if the promise is to pay only the amount actually due on the old debt, and the amount of the loan with lawful interest.

A statement made to an attorney is no more privileged than one made to any other person, unless it is made for the purpose of obtaining professional advice on the subject of such statement.

If it is a statement which has no reference to the professional employment, it falls within the exception to the rule of exclusion, although made while the relation of attorney and client exists.

Accordingly *held* that a statement made by a client, to an attorney, about two years and a half after the latter had obtained a judgment in favor of the former, against D., and several months after the judgment had been assigned by the plaintiff therein to another person, as to the payment of that judgment, was not a privileged communication between attorney and client; the relation of attorney and client, in respect to the action in which the judgment was obtained, being then at an end.

*Held, also*, that it was a matter of no moment, so far as related to that question, that the person to whom the statement was made was, at the time, the attorney of the party making it, in another matter, and that they had just before been in consultation in respect to such other matter.

**A**PPEAL from a judgment on a verdict. The action was brought on a promissory note for one thousand dollars, dated July 2, 1859, made by the defendant Howe, payable three months after date, to the order of the defendant Duckinfield, and indorsed by him. Defense, *usury*. The answer alleged, in substance, that the note in suit was given in renewal of the balance of a previous note for the same amount, made and indorsed by same parties, and given for one thousand dollars loaned by the plaintiff to Howe; and that by the terms of the agreement, and as a condition of the loan, Howe agreed to purchase, and did purchase, of the plaintiff a worthless judgment held by him against Enoch S. Duckinfield, who was insolvent, for the sum of one hundred and eighty-one dollars and fifty-two cents, and paid that sum therefor.

On the part of the plaintiff, it appeared that Enoch S. Duckinfield had carried on the business of malting, at Phelps, several years next prior to the 6th of October, 1858; that a

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short time before that date, he applied to the plaintiff, who was a farmer, to sell him the plaintiff's crop of barley, and to lend him money; that the plaintiff then had a demand against him of about one hundred and eighty dollars, which was in judgment; that it was proposed that the plaintiff should sell him the barley, and lend him money enough, with the price of the barley and the amount of the judgment, to make one thousand dollars, and give a credit of four months, provided Duckinfield would give security; that Duckinfield proposed Howe as surety, and the plaintiff consented to take him, and thereupon it was agreed to meet on the 7th of October and consummate the arrangement; that all the parties met on that day at the malt-house, and Howe, after saying that Enoch had spoken to him about an arrangement for some money, took the plaintiff aside, and stated to him that he and Enoch had made a contract to go into the malting business together, and divide profits equally; that he would give his note for the one thousand dollars, and George Duckinfield, the father of Enoch, would indorse it; that it would not do for Enoch to be known, as he was involved; that all the business was to pass through Howe's hands, and there was an agreement between him and Enoch that he was to take the amount of the judgment out of Enoch's share of the profits; he also said there was a quantity of barley at the malt-house that would pass through his hands. The plaintiff and Howe then joined the Duckinfields, and the transaction was consummated in the mode proposed by Howe. After these facts were testified to by the plaintiff, Howe was examined in his own behalf, and although his attention was called to them, he did not deny them, but admitted them in part, and as to some points disclaimed recollection. It also appeared that in 1858 Enoch Duckinfield commenced carrying on the malting business in the name of his father, and that on the 6th of October in that year his father and Howe agreed, in writing, to carry on the business as partners, and that Enoch should be employed, at his father's expense, as

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clerk and agent, to superintend the business in all its parts, subject to the direction of Howe in the purchase and sale of barley, rye and malt. The partnership term provided for by this agreement expired on the first day of June, 1859, and at that time it was arranged that Howe might run the establishment the next year, to make up the last year's loss; and Howe testified that it was arranged that Enoch should have his living out of it; but it was proved that Howe stated, in the fall of that year, that Enoch was to have half of the profits, after paying the men's board. This arrangement was in force when the renewal not in suit was given. At the expiration of that arrangement, Howe rented the establishment of George Duckinfield, and arranged with Enoch to take charge of it, and to apply one half of the net profits towards paying Enoch's indebtedness to Howe.

The defendant proved the note of \$1000, which was renewed by the note in suit, and the alleged assignment of the judgment, and the note given for the same, which were all made on the 7th day of October, 1858. He then called Charles E. Hobbie, Esq., who testified that he had a conversation with the plaintiff in March or April, 1860, in which the latter, after having finished a consultation with the witness about a matter between himself and Austin Salisbury, said, "I have succeeded in getting my pay, or collecting the Duckinfield judgment." The defendant's counsel then asked the witness this question: "How did he say he got his pay?" The plaintiff's counsel, to lay the foundation for an objection to the question, cross-examined the witness, who testified that he was at the time of the conversation, and then was, an attorney and counsellor of this court, and that he was the plaintiff's attorney in the suit against Duckinfield, and as such sued the demand for him, and got it into judgment. The witness had before testified, on the direct examination, that this conversation came up incidentally after the other case had closed, and that in it he was not acting as the plaintiff's counsel or attorney. The plaintiff's counsel then

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objected to the question, on the ground that the communication called for by it was a privileged one, as between attorney and client, and the objection was sustained by the court, and the defendant's counsel excepted.

The testimony was conflicting as to whether the loan was made to Howe or to Enoch S. Duckinfield. The judge charged the jury, in substance, as follows: That if they believed from the evidence that the loan for which the first thousand dollar note was given was made to the defendant Howe alone, or to the defendant and Enoch S. Duckinfield as copartners, and the plaintiff imposed as a condition of the loan that Howe, or Howe and Duckinfield, should purchase the judgment against Enoch S. Duckinfield at the price of \$181.52, and that Enoch S. Duckinfield was wholly insolvent at the time of such loan, and had no means of paying any part of such judgment, and that the plaintiff knew it; and that the note in suit was taken in renewal of the first thousand dollar note, then the whole transaction was usurious and the note in suit void, and in that case they should find for the defendant. But if they believed from the evidence that such loan was made to Enoch S. Duckinfield alone, the note in suit was valid, and they should find for the plaintiff the amount of the note, with interest.

The jury rendered a verdict for the plaintiff for ten hundred and ninety-four dollars and fourteen cents, and the defendant appealed from the judgment entered thereon.

*D. Herron*, for the appellant.

*Smith & Lapham*, for the respondent.

*By the Court*, JOHNSON, J. The charge to the jury that if they believed, from the evidence, that the loan was made to Duckinfield alone, the note was valid, was unquestionably correct. If such was the fact, it was simply an agreement on the part of the borrower to pay a subsisting debt of his



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own, in consideration of a new credit, or a further loan. There can be no usury in such an agreement if the promise is to pay only the amount actually due on the old debt, and the amount of the loan with lawful interest. I think there was sufficient evidence upon the subject, to authorize the submission of that question to the jury.

But the exclusion of the evidence proposed to be given on the part of the defendant by the witness Hobbie was, I think, clearly erroneous. It was certainly material, in view of the questions tried and submitted to the jury. Indeed, there is no pretense on the part of the plaintiff that it was not material to the issue. It was objected to and excluded on grounds which assumed its materiality, and it is impossible for the court here to see how its admission would have affected the minds of the jury. It was objected to and excluded upon the ground that it was a confidential communication from a party to his attorney, and therefore privileged. It will be seen, however, upon looking with a little care at the evidence on the subject, that the communication sought to be proved, did not partake at all of the character of a privileged communication. The witness had been the attorney of the plaintiff, in the action in which the judgment was obtained. But the communication was made about two years and a half after the judgment was obtained, and several months after the plaintiff had assigned it to the defendant in this action, and had ceased to have any interest in it, or connection with it. The relation, therefore, had entirely ceased between them, in respect to that demand or its enforcement. The witness expressly testified that the conversation came up incidentally between himself and the plaintiff, and that he was not acting as the plaintiff's attorney in respect to the subject of it. It was, plainly, a mere casual statement as to the manner in which a matter had been a long time before disposed of, and about which the plaintiff, so far as appears, neither desired nor sought any advice or counsel. It does not, therefore, come at all within the class

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of privileged communications between attorney and client. It is a matter of no moment whatever, as regards this question, that the witness was at the time the attorney of the plaintiff in another matter, and that they had just before been in consultation in respect to such other matter. That gave the plaintiff no privilege whatever in respect to statements made upon other subjects wholly foreign to the one on which the advice and counsel had been just previously sought. A statement made to an attorney is no more privileged than one made to any other person, unless it is made for the purpose of obtaining professional advice on the subject of such statement. If it is a statement which has no reference to the professional employment, it falls within the exception to the rule of exclusion, although made while the relation of attorney and client exists. (1 *Greenl. Ev.* § 244. 1 *Phil. Ev.* 145. 2 *Starkie's Ev.* 230, 231.) This is the rule in all the standard works upon evidence, and no case can be found to the contrary. If the statement had been made with a view of obtaining professional advice from the witness, in regard to the validity of the transaction, of which the assignment was a part, it would have been privileged. But the evidence expressly negatives this, and shows that it was made merely for the purpose of conveying a piece of information. I have assumed, from the facts disclosed by the evidence, that the relation of attorney and client was at an end, as regards the action in which the judgment assigned was obtained. I think it needs no argument to fortify this assumption. A bare statement of the facts will show most conclusively that the relation growing out of that employment was no longer subsisting when the statement in question was made. Not only was the action at an end, but the plaintiff had, long before, ceased to have any interest in, or connection with, the fruits of the litigation. The foundation of the relation was gone, as much as though the judgment had been paid in money. The witness was not even the attorney of the assignee of the judgment. The case of

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*Williams v. Fitch*, (18 N. Y. Rep. 546,) relied upon by the plaintiff's counsel, is in no respect adverse to the foregoing views, but is entirely in accordance with them. In that case the statement was upon the very subject of the professional employment.

The judgment must therefore be reversed and a new trial ordered, with costs to abide the event.

[MONROE GENERAL TERM, June 2, 1862. *Johnson, Welles and Smith*, Justices.]

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FELLOWS vs. THE COMMISSIONERS for loaning certain moneys of the United States of the county of Oneida, and BLISS.

The rule that when an agent, while strictly pursuing his authority, commits a wrong, he thereby binds the principal, does not apply to a case where the agent departing from the line of his duty is bargaining on his own account, and securing a benefit for his own private advantage, exclusively.

When an agent does not pretend, nor assume, to be acting for another, but purely and strictly on his own behalf, and for his own benefit, a subsequent ratification will not bind the principal.

The payment of a bonus, by a borrower, to the agent through whom a loan is made, without the knowledge or assent of the principal, does not constitute usury, so as to invalidate the security taken on the loan.

R. and P., who were commissioners for loaning certain moneys of the United States, within a certain district, appointed by the state, and acting under a special and limited authority defined by law, and having no power to act for their principal, the state, except that contained in the statute, made a loan to F. of \$500, of the public moneys, taking from him a mortgage to secure the payment thereof, and exacting and receiving from him \$15, by way of bonus to themselves. *Held* that this did not render the mortgage void for usury.

*It seems* that if a borrower of any portion of the United States deposit fund omits to pay the interest due in October and for 23 days thereafter, the mortgage becomes *ipso facto* foreclosed, and the commissioners are seised, at once, of an absolute and indefeasible estate in fee of the lands; after which there remains only a right of redemption, as specified in the act.

THIS action was commenced originally by the plaintiff above named, against "The Commissioners for loaning certain moneys of the United States of the county of Oneida," on

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the 29th day of January, 1861. The object of the action was to set aside and cancel a mortgage executed by the plaintiff and one William K. Fellows, to said commissioners, for \$500, bearing date the 2d day of November, 1855, on the ground of usury. The premises had been conveyed by William K. Fellows to the plaintiff. The interest had been paid on the mortgage until 1860. And on account of the non-payment that year, the premises were advertised to be sold under the mortgage, on the 5th day of February, 1861. At the commencement of the action, an injunction order restraining the defendants from selling was obtained and served with the summons and complaint. That order was vacated by the justice who granted it, of which neither the plaintiff nor his attorney had notice until after the sale of the premises. The defendant Jonathan Bliss became the purchaser at the sale, at the request of the commissioners, with full knowledge of the interest and equities of the plaintiff, and paid no part of the purchase money. The plaintiff then by leave of the court served a supplemental complaint, and amended the summons by making Bliss a party defendant, and the relief prayed for in the complaint was as follows: That the mortgage be declared void, and that the defendants be adjudged to execute a release and discharge of the same; or in case said mortgage should not be held to be absolutely and entirely void for usury, that the plaintiff might be relieved from paying thereon more than the money actually loaned, with the interest. And further, by way of supplemental complaint and as against all the defendants, that the said Bliss be required to surrender up and cancel any and all evidence of title that may have been given to him by the said commissioners upon the aforesaid sale or by reason thereof; and that said sale be declared void, so far as the rights of the plaintiff are concerned. And in case the said mortgage should not be adjudged void, or any part thereof, by reason of any thing in said complaint contained, then that

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the plaintiff be allowed to redeem said premises the same in all respects as if said sale had not been made.

The cause was brought to trial at a special term of this court, on the 20th day of November, 1861, before his honor Judge BACON. And on the opening by the plaintiff's counsel, the counsel for the defendant moved for judgment on the complaint and opening of counsel, upon these grounds: First. That the complaint stated that the interest on the mortgage was not paid, and the proceeding to sell was in pursuance of the statute. Second. The plaintiff asks to be relieved from the non-payment of the interest and the absolute transfer of the title of the mortgaged premises, by virtue of the 1 *R. S.* 698, § 32, 5th ed., to be relieved from the sale of the mortgaged premises and its effect. To obtain this relief, they must bring into court and offer to pay the money actually loaned. Third. This is not a case of usury; the commissioners, Messrs. Rouse and Potter, were agents of the lender—acting under a special and public authority. The authority was by virtue of a general statute, and every one is deemed to know it. There is no pretense or allegation that the lender, which is the state, received any bonus, or authorized, or had knowledge of, or assented to, any. That could only be done by act of the legislature. The payment of a bonus to an agent, through whom a loan is made, without the knowledge or assent of the principal, does not invalidate the security. The bonus must be for the lender, the principal. In this case, it is admitted the alleged usury was not in fact received for the principal's benefit. Fourth. The plaintiff is not entitled to have the sale opened by reason of the injunction, or any thing pertaining to it, as he has not made a case which entitles him to have the sale opened. He has not shown that he desired to bid at the sale, or to redeem the premises.

The court granted the motion, to which ruling and decision the plaintiff excepted. The plaintiff's counsel then offered to prove all the facts and allegations set out in the

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complaint, to which the defendants' counsel objected, on the grounds that the facts stated in the complaint, coupled with the admission that the money alleged to have been paid or allowed for usury, was not taken for or paid over to the state, did not entitle the plaintiff to the relief demanded. The court sustained the objection, to which the plaintiff's counsel excepted. The court then, on motion of the defendants' counsel, dismissed the complaint, and the plaintiff appealed from the judgment.

*L. J. Sanders*, for the plaintiff.

*C. H. Doolittle*, for the defendants.

*By the Court*, BACON, J. This case was decided mainly upon the authority of *Condit v. Baldwin*, (21 N. Y. Rep. 219,) with which it is nearly identical in its facts, and from which it seems to me impossible to distinguish it, in principle. In that case the money loaned (\$400) was the money of the plaintiff, intrusted to one Williams as her agent to loan. The defendants negotiated a loan for that amount, from Williams, and the promissory note of the defendants for the amount of the \$400 was received by Williams for the plaintiff, and the sum of \$25 was paid by them to Williams as a bonus, for his own use and benefit. The suit was upon the note, in the name of the lender of the money, and the defense of usury was pleaded, and it was adjudged in the supreme court and on appeal by the court of appeals, that where an agent thus intrusted with money to invest at legal interest exacted a bonus for himself as a condition of making the loan, without the knowledge of his principal, this did not constitute usury in the principal, nor affect the security in his hands.

The doctrine of the court in that case is in substance that, to constitute usury, there must be an unlawful intent on the lender to take illegal interest, and the intention to secure the

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illegal interest must have been in the full contemplation of both the real parties to the transaction. In contracting for, and receiving, the bonus, the agent was not acting in the business and in behalf of his principal, but departed from his instructions, and violated the law. The rule, therefore, that when an agent while strictly pursuing his authority commits a wrong, he thereby binds the principal, does not apply to a case where the agent, departing from the line of his duty, is bargaining on his own account, and securing a benefit for his own private advantage exclusively.

In answer to the argument that by accepting the note and commencing a suit upon it claiming the full amount, the plaintiff had ratified all the acts of the agent connected with the loan, it was said that the plaintiff only ratified the loan at the rate of interest expressed in the note, and that having had no knowledge of the alleged usury, the principal could not be held to have ratified the payment made to the agent on his own behalf. As to the plaintiff, the whole transaction of the exaction and receipt of the bonus was "*inter alios acta*." When an agent does not pretend, nor assume, to be acting for another, but purely and strictly on his own behalf and for his own benefit, a subsequent ratification does not bind the principal.

These views and principles were, I am aware, strongly controverted by an able dissenting opinion of Judge Comstock, but they were concurred in by a majority of the court, and the decision is the decision of the court, and, whatever private view we may entertain, is to be followed and respected as the law of the land.

All the essential facts of that case in the court of appeals exist in the present case. The money for the loan of which the mortgage of Fellows, which is sought to be avoided for usury, was taken, formed originally a part of the United States surplus moneys deposited with the state, and which the state received upon trust for its repayment whenever called for by the government of the union. This money was

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apportioned among the several counties in the state, to be loaned for the purpose of providing a fund for educational objects, and commissioners were appointed in each county, who were, by the act creating them, to loan the money on adequate mortgage security, at seven per cent interest. The mortgage in this case was given to the "commissioners for loaning certain moneys of the United States of the county of Oneida." Rouse and Potter were the individuals then in office, and were the agents of the lender, which was the state, acting under a special and limited authority defined by law, and had no power to act for the lender, except that contained in the statute.

Of course the state knew nothing of the alleged transaction between Rouse and Potter and the mortgagor, which is claimed to have been usurious, and it is admitted that the bonus, if any was paid, was not received by the state. Such being the conceded facts, the case is brought precisely within the principle established in *Condit v. Baldwin*, that the payment of a bonus to the agent through whom a loan is made, without the knowledge or assent of the principal, does not constitute usury so as to invalidate the security taken on the loan.

It is said that these parties were something more than agents; that they were the lenders of the money, having no principal to consult, and no one behind to assent to, or dissent from, their proceedings. Precisely the same thing might have been said, and the same facts existed in the case of *Condit v. Baldwin*. Williams had his general authority to loan the money for his principal, at seven per cent; the same authority the statute gave the commissioners in this case. The lender knew nothing of the negotiation, nothing of the security, and each received and held the obligation to pay the money that each had advanced, ignorant of, and unaffected by, an outside arrangement wholly beyond the authority, and for the exclusive private benefit and advantage of the agent. The plaintiff having failed to show that the mortgage was



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void for usury, which was the entire gravamen of his complaint, was properly nonsuited, and the complaint dismissed.

There was no application upon the trial for leave to redeem the premises from the mortgage sale, by paying the mortgage and the interest, although there is such a prayer in the complaint. The case was decided entirely upon the allegations of fact in the complaint coupled with the real admissions made on the trial, and the other point, now suggested for the first time, did not arise.

I am strongly inclined to think that there is another fatal objection to the remedy sought here, to wit, that the application comes too late. By the statute (1 R. S. 698, § 32, 5th ed.) it is provided that if the borrower omits to pay interest due in October and for twenty-three days thereafter, the mortgage becomes *ipso facto* foreclosed, and the commissioners are seised at once of an absolute and indefeasible estate in fee of the lands, "any law, usage or practice of the courts of equity to the contrary notwithstanding." After this there remains only a right of redemption, as specified by the act. The interest on this mortgage was not then paid, and by the act the title became absolutely vested in the commissioners beyond the reach of a court of equity. If the plaintiff desired to be relieved from this mortgage upon the grounds he has alleged, it seems to me he should have moved before the forfeiture, and the absolute alienation which the statute makes, and that neither relief nor redemption are now within his power.

But however this may be, I think that on the other ground the relief was properly denied, and the judgment dismissing the complaint should be affirmed.

[OSWEGO GENERAL TERM, July 8, 1862. *Mullin, Morgan and Bacon, Justices.*]

THE PEOPLE, *ex rel.* Whillis, *vs.* BROTHERSON.

An attachment will not be granted against an attorney, for the non-payment of money collected by him for a client, after the remedy by action is barred by the statute of limitations.

The proceeding by attachment, to compel the payment of money, is a civil remedy, and unless a legal right be established, the application for an attachment is without foundation.

The court will not compel payment, in any form of proceeding, when it is made to appear that there is nothing due according to the law of the land.

**M**OTION for an attachment to compel the payment of money collected by the defendant as an attorney.

BOCKES, J. This is an application by Mr. Whillis against Mr. Brotherson, an attorney and counsellor of this court, for an attachment for the non-payment of money collected and received by him in an action in which Whillis was plaintiff and John Gilchrist was defendant.

The motion for the attachment against Brotherson was noticed for the 15th of January, 1861, the papers for the motion having been served probably about the first of that month, as the notice bears date on that day. It appears that the motion was actually made on the 21st January, 1861, when, the papers presented being in conflict and leaving the material facts in an unsatisfactory state, an order was directed, referring it to "W. L. F. Warren, Esq., as referee to take the evidence upon the question presented by the affidavits which were controverted, and report the evidence to the court, with his conclusions of fact thereon." The referee heard the matter pursuant to the order, and filed his report, with the evidence taken before him. The motion is now renewed on the original papers and the said report and evidence.

A very great proportion of the matters stated in the affidavits and in the proof taken by the referee are of no value on this motion, and might well be expunged. The material facts on which the motion must be determined, now stand,

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in my judgment, indisputable, and are these: On the 8th March, 1845, Whillis recovered a judgment against Gilchrist, in a justice's court, for \$93.32 damages and costs. An appeal was taken by Gilchrist to the Saratoga common pleas, where the cause was tried in September, 1845, and judgment was rendered against Whillis for costs of suit. Whillis then took an appeal to the supreme court, and obtained a reversal of the judgment, with an order for a new trial. The action was thereafter tried three times in the common pleas without obtaining a verdict; the jury at each trial being unable to agree. The cause then came into the supreme court, under the new constitution of the state, and pursuant to the judiciary act of 1847. A fourth trial—or rather a fifth, counting that before the justice as one—was commenced at the circuit, and it appearing that the case was referable, the judge ordered a reference to Judge Doe, as sole referee, to hear and determine the case. It was heard before the referee, who on the 13th October, 1848, reported in favor of Whillis for the sum of \$157.97. Judgment was entered on this report on the 23d December, 1848, for that sum, with \$343.27 costs, in all \$501.24. A case was made and settled, and an application was made to the supreme court, at general term, for a new trial, which was denied without costs to either party. But the damages to be recovered were reduced to \$100. I infer this application for a new trial was on appeal from the judgment entered on the report of the referee, and it seems that the denial of a new trial was early in 1850.

Mr. Brotherson was attorney of record and counsel for Whillis from the commencement of the action, and as such attorney collected and received the amount of the judgment, and on the 25th June, 1850, acknowledged satisfaction and discharged it of record. Immediately thereafter, and in the following month, July, 1850, Whillis demanded or claimed of Brotherson such portion of the judgment as belonged to him. But Brotherson did not pay him any part of it, but still retains the whole amount so collected and received, claim-

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ing that what he holds is no more than a fair remuneration for his services in the action.

As regards the facts above detailed, there is no controversy—no dispute. Both parties admit them to exist. Suppose these facts to constitute the whole case—and this is putting it in the most favorable light for the relator—is he entitled to his motion for an attachment? The defendant, Brotherson, insists that this extraordinary remedy is resorted to for the purpose of enforcing a stale demand—a claim admittedly barred by the statute of limitations. It is entirely clear that the demand could not be enforced by an ordinary action, against a plea of the statute of limitations. The money was collected on or prior to the 25th June, 1850, nearly ten years before this proceeding for an attachment was taken. It was held in *Stafford v. Richardson*, (15 *Wend.* 302,) that an action against an attorney for moneys collected by him must be brought within six years after the money is received by him, or the plaintiff will be barred by the statute of limitations. In this case Judge Savage remarks, (*p.* 306,) that the plaintiff should have brought his suit within six years from the time of receiving the money; and it is no excuse for him that he had made no demand. It was his own fault that he had not put himself in a condition to sue, and he can never take advantage of his own laches. But if it be assumed that no action can be maintained against an attorney, for money collected by him, until demand, as is undoubtedly the rule, (*Taylor v. Bates*, 5 *Cowen*, 376; *Rathbun v. Ingals*, 7 *Wend.* 320,) then Whillis' right of action was perfect as early as July, 1850. This is clearly established by the proof on both sides. Indeed the attorney and counsel for the relator on this application swears that he knew this claim was outlawed as an ordinary action when he advised Whillis to take this proceeding.

The question then is this: Can the relator have a remedy by attachment when he is shown to have none by an ordinary action? I am well satisfied he cannot. The statute of lim-

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itations is a statute of peace, and may be urged as a protection against a stale demand, in whatever form the claim may be presented in court. It has been well said that the statute is founded in a wise policy, and is not to be subjected to judicial exceptions arising from supposed equity. It furnishes a general rule for the observance of the court in cases that are analogous in character. So it was held in *Paff v. Kinney*, (1 *Bradf.* 1,) that although the statute was not in terms applicable to proceedings in the surrogate's court, still there was no reason why an action barred by the statute in all other courts should be sustained in the surrogate's court. This principle was somewhat elaborated by the chancellor in *McCartee v. Camel*, (1 *Barb. Ch. R.* 455.) He says, "the statute of limitations does not in terms specify the time within which a creditor, legatee or distributee shall institute a suit before the surrogate, against executors or administrators, to obtain payment of his debt or legacy, or his distributive share of the estate of the decedent. But the legislature never could have intended to give to a party the right to institute such suit before a surrogate, after his remedy was barred by the statute of limitations in all other courts. Such suits, therefore, by analogy to the statute of limitations, should be instituted before the surrogate before the time in which suits of the same character are required to be commenced in a court of common law or of equity." It has also been often held that when the courts of law and equity have concurrent jurisdiction over the cause of action, equity will act in obedience to the statute of limitations, and such defense will prevail if available in the law courts. In such cases of concurrent jurisdiction, equity must be governed by legal rules. This principle was applied in *The People v. Everest*, (4 *Hill*, 71,) which was, like this, an application for an attachment. I regard the case cited as directly in point. The motion was for an attachment against the sheriff, for not returning an execution. The excuse was that the statute of limitations had run against an action for not returning the writ. The

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court held that this was no excuse why the officer should not make return, inasmuch as that was essential to warrant further proceedings by the plaintiff on the judgment. But it was further held, that although the statute of limitations was not *proprio vigore* a bar to the application as a civil remedy, still the action at law being barred by the statute, damages ought not to be summarily awarded. Judge Cowen remarks, the action being barred, the party by asking for a fine seeks by indirection what the statute has denied him directly. He adds: "the general statute of limitations has no application *eo nomine* to a bill in equity, even when that is concurrent with the remedy at law. Yet the court of chancery always allows it in such case to be pleaded, for the reason that the party should not be allowed to evade its effect by resorting to another forum. The principle applies here. Being barred of a remedy by action, he should not be permitted to hide his laches under the form of a proceeding for contempt." The decision in *Van Tassel v. Van Tassel* (31 Barb. 439) is to the same effect, and is, as I conceive, directly in point. In the case under examination the right of the relator, Whillis, to proceed by action at law and by summary application were concurrent. This ground of action, as well as his right to summary relief, rested alike on the validity of his legal claim. The proceeding by attachment to compel the payment of money is a civil remedy, and unless a legal right be established, the application for the attachment is without foundation. The court will not compel payment in any form of proceeding when it is made to appear that there is nothing due according to the law of the land.

There are other grounds of objection to the application urged, but it is unnecessary to examine them. The motion for an attachment must be denied, for the reason above stated.

The original notice of motion stated that an order would also be asked for, requiring Brotherson to show cause at the

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general term why he should not be stricken from the roll as an attorney of this court. This branch of the motion was not urged before me. I understand the motion now before me to be for an order, merely, that Brotherson pay \$420.54, interest and costs, or that an attachment issue against him.

It seems, however, that the English courts will not strike an attorney from the roll for the non-payment of money collected by him simply, and, in the absence of fraud, trickery and evil practice. (24 *Eng. Law & Eq.* 392, 3. 89 *Eng. Com. Law*, 409.) In the former case cited, Jervis, C. J. remarks, there must be very special circumstances to justify such a course; mere non-payment of money will not do. (But see 2 *Cowen*, 588; 5 *Paige*, 311.) It is suggested in one case, that after the issuing of an attachment, and in case that should not be efficacious in producing the money, then the attorney might be *suspended* from practice until he should pay as directed by the order. The suspension and removal of attorneys is to a considerable extent regulated by statute. (1 *R. S.* p. 109, §§ 23, 24.) I do not deem this question before me on this motion.

Motion for attachment denied.

[SARATOGA SPECIAL TERM, August 5, 1862. *Bockes*, Justice.]





# I N D E X.

## A

### ACCOUNT.

*See* DEMAND.

### ACTION.

An action will not lie by one judgment creditor, against another, for the purpose of determining the question as to the priority of their respective liens upon the equitable property of the judgment debtor in the hands of a receiver. *Myrick v. Selden*, 15

*Cause of.* *See* ASSIGNMENT.

*Right of.* *See* TENANT FOR LIFE, 3.

*On stock notes.* *See* INSURANCE, (FIRE,) 13 to 16.

*See* DEMAND, 1.

FRAUD, 4, 5.

PRINCIPAL AND AGENT, 1.

RELIGIOUS SOCIETIES, 1, 2.

### ADVERSE POSSESSION.

1. A grantee, by accepting a deed containing an exception of certain lands previously sold and conveyed to another, and then entering into the possession of the lands thus excepted, will be deemed in law to have entered in subserviency to the title of the grantee of the excepted land, and to continue to hold in subserviency thereto; unless he can establish the contrary, by some clear and unequivocal act or claim of title in himself. *Rosseel v. Wickham*, 386

2. Thus, where W., in 1812, took a conveyance from L. of certain lands

therein described, in which other lands were excepted, and the fact recited that the lots thus excepted had been previously sold and conveyed to B., and W. went into possession of the lands so conveyed, and of the lots excepted, at the same time, and occupied them from 1812 to 1860; *Held* that although W. had been in possession of the excepted lots for more than twenty years, his entry was not hostile to the title of those claiming under B., and his possession was not adverse to theirs, so as to bar a recovery of the possession of the lots, in ejectment. *ib*

3. The statutory provision that every conveyance of land held at the time adversely to the grantor, shall be void, has no application to conveyances made by the *state* as grantor. *Brady v. Begun*, 533

4. Where the defendant entered under a contract with the state to purchase the premises, as the representative of S., the first purchaser, through several mesne assignments; made some small payments thereon; endeavored to effect an arrangement to pay the balance; and frequently spoke of the claim and title of the state, and of himself as holding in subserviency to it; *Held* that his possession was to be deemed in subserviency to the title of the state, and not adverse. *ib*

5. And the defendant having been twice put out of possession of the premises, by process instituted by the state, both in 1847 and 1848; *held* that there had been no contin-

uous possession in the defendant, but the chain had been twice broken by legal process and under a paramount claim. *ib*

#### AGREEMENT.

1. J. R., the son and administrator of D. R. deceased, presented a petition to the surrogate, alleging that D. R. was indebted to him, in his lifetime, and at the time of his death, in the sum of \$3000, for work and labor, and also for cutting and drawing fire wood for the use of the wife of the intestate, (the mother of J. R.,) and for supplying her with vegetables, and waiting and attending upon her necessities during a period of 25 years; she during that time living alone and being deserted by her husband; that such services were rendered, and the labor performed, under the expectation and upon the promise of the intestate that he would devise to J. R. his homestead farm, and certain meadow land; that D. R. died intestate leaving other persons besides the petitioner, entitled to share the lands. The petitioner prayed that he might be allowed to prove his claim, and retain the amount thereof out of the personal estate in his hands. It appeared upon the hearing that the services were rendered during a period of more than 25 years; that no account had ever been kept of what was done; of who did it; or of what was furnished; or of the time when. And no account was ever rendered to D. R. in his lifetime; and there was nothing to show that he was ever aware that he was under any obligation to compensate J. R. by a devise of the land. *Held* that the presentation of such a demand, for the first time, after the decease of D. R., was calculated to awaken some suspicion as to its validity, and to demand clear and unequivocal evidence of its truth. That nothing short of this would satisfy the simplest demands of justice and good faith. *Raynor v. Robinson*, 128
2. That to justify the allowance of the claim, it was indispensable that the proof should establish a contract to pay for the services rendered to the wife of D. R. by a devise of the land. That it could not be upheld upon any other ground; and if the proof fell short of establishing such a contract, or a mutual understanding to that effect, that the claim could not be allowed: 1. Because such was the claim in the petition of J. R., which alleged a special contract to pay for the services by a devise of the land. 2. If there was no special contract, or mutual understanding, to make compensation in a particular way, and at a future time, to wit, by a devise of the lands to take effect upon the death of the promissor, then the remuneration for the services was payable presently, and the claim, or most of it, was barred by the statute of limitations. *ib*
3. Loose declarations of an intestate that he intended his son should have the farm of the former; that it would all be his (the son's;) and that he intended to give it to the son; *held* insufficient to authorize the court to infer an *agreement*, on the part of the intestate, to devise the farm to the son, as a remuneration for personal services. *ib*
4. No right can be derived from any agreement made in express opposition to the laws of the place where it is made. *Otis v. Harrison*, 210
5. The rule as to contracts is that the *lex loci contractus* governs, as to the nature, validity, construction and effect of the contract, and the *lex fori* as to the remedy. *Gans v. Frank*, 320
6. The application of this rule will dispose of any defense arising upon a statute of limitations of a foreign state, where such statute only prohibits the bringing of an action after the time limited, in such state. The statute has no effect out of the state, and is not violated by bringing an action in another state or country. *ib*
7. G., being the owner of a patent right for the cities of New York and Brooklyn, and some tools, on premises leased by him, employed the plaintiffs to construct a planing machine, for him, to enable him to effectuate his interest in the patent right. He then sold his interest in

- the lease of the premises, with the tools and machines, and in the patent right, to V. Before the plaintiffs had commenced work upon the planing machine, G., accompanied by V., called on them and informed them that he (G.) had sold out his interest to V., who assented to the statement. The plaintiffs then proceeded with the machine, and completed it, and delivered the same to V. and charged him with the price. *Held* that V. could only be made liable upon the ground of an original promise; but that if he expressly or impliedly directed the plaintiffs to complete the machine, and the same was completed and delivered to him, he was bound to pay therefor. *Sloan v. Van Wyck*, 335
8. *Held also*; that a subsequent taking back of the machine, by the plaintiffs, would not prevent a recovery by them, where it appeared that they merely took it back for the purpose of making a sale thereof on account of V., without intending to discharge his liability. *ib*
9. The defendants invited estimates for 26 or 27 meerschauts, or retorts, to be delivered in certain numbers, at certain dates; adding, "any number at our option." The plaintiff offered, in writing, to build 26 or 27, of brick, for \$1650 each, or of iron at \$1850 each. He then added this clause: "All the above to be in accordance with 1st plan and specification dated 4th inst., and to be delivered at such dates and in such numbers as you may specify within the next 65 days." To this proposition the defendants replied, in writing, assenting to the same and to the terms thereof; and adding, "the above to be 27 meerschauts." *Held* that the plaintiff proposed a *variance* from the terms named by the defendants, in respect to the *option*, and the same was assented to by the defendants. That it was therefore an agreement for 27 meerschauts. *Underhill v. North American Kerosine Gas Light Co.*, 354
10. *Held also*, that the plaintiff was entitled to recover the damages which he had sustained on the breach of the contract by the defendants in refusing to take the whole number of meerschauts agreed on. *ib*
11. An agreement to convey land to another, upon the consideration that the latter shall give all the aid in his power, spend his time, and use his utmost influence and exertions, to procure the passage of a law pending before the legislature conferring upon the covenantor a valuable public franchise, is illegal and void, as being against public policy. *Mills v. Mills*, 474
12. The defendant, with others, made his subscription to raise an amount sufficient to induce a religious association to establish and found a collegiate institute, to be located at N., where he resided; which subscription was also used to induce the regents of the university to grant a charter for such institution. The institution being incorporated, the defendant acted as one of the trustees, and paid two installments upon his subscription, to enable the officers to proceed with the erection of the collegiate buildings. He did not refuse to act as trustee, or to pay upon his subscription, until after contracts had been made, and measures had been taken to erect the buildings, and large expenses for that purpose incurred. *Held* that the defendant must be deemed to have requested the corporation to proceed with the erection of the buildings described in the subscription paper, and to have ratified and affirmed his subscription, and the acts of the trustees in incurring expense towards the erection of the college edifice. *Wayne and Ontario Collegiate Institute v. Smith*, 576
13. Where the subscribers to a paper severally agreed well and truly to pay the several sums set opposite to their respective names, to the treasurer of a board of trustees to be thereafter elected, said money to be expended in the erection of an institution of learning, to be built of brick, at least three stories high, and capable of accommodating 500 pupils, &c. and to be located at N.; *Held* that each subscription should be regarded as a conditional promise or proposition to pay the sum subscribed, towards the expense of

erecting an institution of learning in the manner, and upon the terms, and of the description specified in the paper, which promise became binding upon each subscriber when accepted, adopted and acted upon by the corporation. *ib*

14. After the corporation has proceeded, upon the faith of the engagement contained in such a paper, to make contracts and incur liabilities for the erection of buildings, the proposition of the subscription paper should be deemed accepted, and the liability of the subscribers fixed. *ib*

15. Such subscriptions can be sustained, upon the principle that gratuitous promises or propositions to pay money upon condition, or upon the happening of some event, or the doing of some act, or incurring some expense, loss or legal obligation, become binding as legal and valid contracts, upon acceptance and performance of the stipulated condition. *ib*

*See* HOPS.

RAIL ROAD COMPANIES, 1, 2, 4.

SHERIFF.

SHERIFF'S SALES.

#### AMENDMENT.

*See* SLANDER.

#### APPEAL.

1. From an order made by commissioners of highways, laying out a public highway, an appeal lies to the county judge by every person who shall conceive himself aggrieved by such determination, provided he be a resident tax-payer of the town, and as such, liable to assessment therein for highway labor. *People ex rel. Ridgeway v. Cortelyou*, 164

2. It was not the intention of the legislature to restrict the right of appeal to the applicants for the road, and those persons over whose lands it is proposed to lay it out. *ib*

3. It is the duty of referees appointed by a county judge, to hear and determine an appeal from an order of commissioners of highways, laying

out a highway, to proceed to hear the proofs and allegations of the parties, and to make and file their decision in writing, affirming, reversing or modifying the order appealed from. They have no power to dismiss the appeal and refuse to proceed further, upon the ground that the order of the county judge was improvidently or irregularly granted, or that the appellant had no right to bring an appeal. *ib*

4. But if the referees, instead of hearing and determining the appeal, dismiss the same, upon a preliminary objection, and thus in effect refuse to execute the trust committed to them, the remedy of the party is not by a common law certiorari, to review the proceedings, but by a *mandamus*, it seems, to compel the referees to proceed. *ib*

#### ASSESSMENT.

1. If the state has the power to levy and collect a tax or assessment, to be paid to a rail road company as a compensation for the relinquishment of certain rights, it has the power to direct the transfer of the assessment, collectively, to the same company, for the same purpose, before its payment. *People ex rel. Crowell v. Lawrence*, 177

2. The imposition and confirmation of an assessment by the city of Brooklyn, in pursuance of the act of April 19, 1859, for the purpose of compensating the Long Island Rail Road Company for the relinquishment of its right to use steam power within said city, are not forbidden by the act relative to local improvements in the city of Brooklyn, passed April 11, 1861. (*Laws of 1861, p. 462.*) *ib*

3. Where commissioners of assessment, appointed under the act of April 19, 1859, upon certiorari directed to them, return the proceedings which resulted in their appointment, by which it appears that both the common council of Brooklyn and the supreme court, at special term, determined that a petition by a majority of the persons to be assessed, sufficient in form and character, had been presented to the common coun-

cil, such determinations will be held conclusive, upon that question. *ib*

*Of stock notes. See INSURANCE, (FIRE.)*

#### ASSIGNMENT.

A cause of action for the conversion by the defendant of funds intrusted to him as an agent, for which he has not accounted to his principal, is assignable. Such a cause of action would survive to the personal representatives. *Gould v. Gould*, 270

*By debtors. See DEBTOR AND CREDITOR.*

#### ATTACHMENT.

1. An attachment will not be granted against an attorney, for the non-payment of money collected by him for a client, after the remedy by action is barred by the statute of limitations. *People ex rel. Whillis v. Brotherson*, 662

2. The proceeding by attachment, to compel the payment of money, is a civil remedy, and unless a legal right be established, the application for an attachment is without foundation. *ib*

3. The court will not compel payment, in any form of proceeding, when it is made to appear that there is nothing due according to the law of the land. *ib*

#### ATTORNEY.

*See ATTACHMENT. PRACTICE, 5.*

### B

#### BANKS.

1. The cashier of a bank has no power to make a contract for the bank, in his own name, unless the corporation has authorized him to do so, on its behalf, and with the intention that it should be bound. *Bank of the State of New York v. Farmers' Branch of State Bank of Ohio*, 332

2. Accordingly, where a cashier, though authorized to indorse, for the pur-

pose of transmitting to other banks for collection, bills and notes deposited with his bank or discounted by it, had no special authority to affix his name, or that of the bank, for the purpose of making the corporation liable on a contract of indorsement, but in order to facilitate the collection of a bill he indorsed the same as follows: "Pay E. Ludlow, Cas. or order; P. S. Campbell, Cas." *Held* that the bank was not made liable as indorser of the bill. *ib*

3. Where the president of a bank, having authority as such to certify checks drawn upon the bank, certifies his own checks, and the checks of another person, and delivers them to the payee, who thereupon pays to the drawers the full amount of the face of such checks, and transfers and indorses the same to a *bona fide* holder, the latter can enforce the payment of the checks by the bank; notwithstanding the drawers had no funds in the bank, at the time the checks were drawn. *Claf- lin v. Farmers and Citizens' Bank of Long Island*, 540

4. No presumption of bad faith in the holder necessarily arises from the identity of the names of the drawer and the president of the bank; nor will the certification of his own check by the president of a bank be conclusive, as evidence, to deprive the holder of the protection afforded to *bona fide* holders of negotiable paper. *ib*

#### BILLS OF EXCHANGE.

Where drafts were drawn by W., the president of a corporation, and signed with his own name, with the addition of "Prest. T. N. Co.," and it was proved that he drew the drafts in his capacity of president, for the benefit of the company; that the company received the proceeds; and that it subsequently recognized its liability by giving its bond as collateral; *Held* that the evidence showed that the signature of W. was official, and not private, and rendered the drafts the drafts of the company, within the cases of *Babcock v. Beman*, (11 N. Y. Rep. 200,) and *The Bank of Genesee v. The Patchin*

*Bank*, (19 *id.* 312.) *Thompson v. Tioga Rail Road Company*, 79

*See* BANKS.

#### BONA FIDE PURCHASER.

*See* MORTGAGE, 1, 2.

#### BOND.

1. A bond, issued by a rail road company, acknowledged the receipt of \$1000 from . . . . ., and in consideration thereof the company promised and agreed to pay to . . . . ., or assigns, the sum of \$1000, ten years after date, &c. In an action upon the bond, the complaint averred that the corporation received the money from some person unknown to the plaintiff, and delivered the bond to such person for the purpose and with the intent that the same should be assignable and transferable by delivery from hand to hand; that before its maturity it came lawfully into the possession of the plaintiff, for value, and that he was the owner and holder. *Held*, on demurrer, that the complaint was sufficient, and that the action would lie; any lawful holder by delivery or transfer being authorized to fill his own name into the blank, as the payee. *Hubbard v. New York and Harlem Rail Road Co.*, 286

- 2. *Held also*, that bonds in that form were not void as being in violation of the act to restrain unauthorized banking; inasmuch as they were payable ten years after date, instead of on demand, and therefore could not circulate as money. *ib*

*See* LIMITATIONS, STATUTE OF, 6, 7, 8.

#### BROOKLYN, (CITY OF.)

*See* MUNICIPAL CORPORATIONS.

#### BROOKLYN, JAMAICA AND FLATBUSH TURNPIKE COMPANY.

The Brooklyn, Jamaica and Flatbush Turnpike Company did not acquire, and had no authority to acquire, under their act of incorporation, any other estate in the lands taken for their road, than an incorporeal hereditament, or right of passage. *Dunham v. Williams*, 136

### C

#### CARELESSNESS OR NEGLIGENCE.

The keeping of a house of ill fame is not an act of "carelessness or negligence," within the meaning of the 3d section of the act of April 13, 1855, which exempts counties or cities from liability for injury to, or destruction of, private property in consequence of a mob or riot, when such injury or destruction has been occasioned, or in any manner aided, sanctioned or permitted by the *carelessness* or *negligence* of the owner, and he shall not have used all reasonable diligence to prevent the injury. *Blodgett v. City of Syracuse*, 526

#### CARRIERS.

1. In the case of travel by passengers upon an ordinary highway, in a public conveyance—especially when the highway is a crowded city street—the possible negligence or misconduct of the owners or drivers of other vehicles, over whom the carrier has no control, is a risk which a passenger cannot cast upon the carrier, but must, so far as the latter is concerned, take upon himself. *Spooner v. Brooklyn City Rail Road Co.*, 217
2. Hence, if a passenger in a vehicle upon a city street voluntarily assumes a position which is not intended and ordinarily used for the conveyance of passengers, and which is exposed to danger from such misconduct, he himself contributes to an injury which he sustains by a collision produced by the willful or the negligent acts of a third party, without any fault in the management of the vehicle which carries him. *ib*
3. Under such circumstances it is well established that he cannot recover against the carrier. *ib*

#### CASES DISAPPROVED, COMMENTED ON, AND EXPLAINED.

1. The case of *Goodsall v. Baldero*, (9 *East*, 72.) disapproved, and shown to have been overruled in England, and not now law, there. *Rawls v. American Life Ins. Company*, 357



2. The cases of *Wood v. Colvin*, (2 *Hill*, 256,) and *Cameron v. Erwin*, (5 *id.* 272,) commented upon and explained, and some of the dicta of Judge Cowen, in the latter case, overruled. *Warner v. Blakeman*, 501

#### CHARGE UPON LAND.

See *WILL*, 2.

#### CHARITIES.

A gift to a charity, if there is a competent trustee, although there is no ascertained, or ascertainable, beneficiary, may still be upheld, provided the charitable use is so clearly and certainly defined as to be capable of being specifically executed and enforced, as intended by the donor, by judicial decree. *Goddard v. Pomeroy*, 546

#### CHECKS.

See *BANKS*.

#### CITY COURT OF BROOKLYN.

The jurisdiction of the city court of Brooklyn being declared, by the act establishing such court, to extend to actions against corporations created under the laws of the state and transacting their general business within said city, or established by law therein; *Held* that such court had jurisdiction of an action brought against the Brooklyn Ferry Company, to recover damages for an injury to the plaintiff's boat, caused by a collision. *Crofut v. Brooklyn Ferry Co.*, 201

#### CLOUD UPON THE TITLE.

See *TRUST AND TRUSTEES*, 8.

#### COMMISSIONERS OF HIGHWAYS.

1. A commissioner of highways has no power or authority to bind a town, except such as is expressly conferred by statute, or such as is necessarily implied from the power expressly conferred. *Mather v. Crawford*, 564

2. The statute nowhere, either expressly or impliedly, authorizes such commissioner to pledge the credit of the town, in any manner. *ib*

3. A commissioner who enters into a contract with an individual for work, either upon highways or bridges, when no means have been provided by the town, may incur a personal liability, but cannot impose any liability upon his successor in office, or upon the town. *ib*

4. The principle of estoppel does not apply to the unauthorized acts of a predecessor in office, when the action is to charge the successor in his official capacity. *ib*

5. Commissioners of highways have the implied power to construct new bridges; especially such bridges as it is the duty of towns to make and keep in repair. *ib*

6. But in no case have commissioners any power or authority to construct bridges, at the expense of the town, or of the county, unless they are connected with, and form a part of, an existing highway. *ib*

See *APPEAL*.

#### CONSTITUTIONAL LAW.

1. The acts of April 19, 1859, (*Laws of 1859*, p. 1109,) and March 28, 1860, (*Laws of 1860*, p. 178,) are not in conflict with the 16th section of the third article of the constitution, which declares that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in its title." *People ex rel. Crowell v. Lawrence*, 177

2. Neither are those acts unconstitutional, on the ground that they authorize the taking of private property for a purpose not sanctioned by the constitution, and in a manner which that instrument forbids. *ib*

3. When the legislature determines that a public improvement will be a benefit to the adjacent property, and that the expenses of making the same shall be paid by the owners of such adjacent property, the courts have nothing to do with the correctness or incorrectness of the deter-

- ination, but must assume the fact to be as the legislature assumes or declares it. *ib*
4. The wisdom or justice of the taxation is not a subject of judicial inquiry; nor is the purpose for which the tax is to be imposed. *ib*
  5. The legislature is not confined, in such taxation, to existing political or civil districts; but may create a district for the purpose of taxation or assessment; and may impose the tax equally or *pro rata* upon all the property in the district thus formed *pro re nata*, or upon a rule of estimated benefit to different owners or individuals; and the proceeds of the assessment may be applied to some public or quasi public purpose, or to compensation to, or the redress of, individuals. *ib*
  6. The constitution demands that the title of an act shall express the *subject*, not the *object*, of the act. It is the matter to which the statute relates, and with which it deals, and not what it professes to do, which is to be found in the title. *ib*
  7. It is no constitutional objection to a statute that its title is vague or unmeaning as to its purpose, if it be sufficiently distinct as to the matter to which it refers. *ib*
  8. *It seems* that no constitutional provision can be treated as merely directory and not imperative. But if any provisions of the constitution ought to be considered directory, the rule by which to ascertain what are mandatory and what directory must be those applied to statutes. *ib*
  9. Laws are not unconstitutional for the reason that they are retrospective. *Bay v. Gage*, 447
  10. Retrospective laws which do not impair the obligation of contracts, or affect vested rights, or partake of the character of *ex post facto* laws, are not prohibited by the constitution. *ib*

#### CONTIGUOUS OWNERS.

The plaintiff and defendant being owners of adjoining lots, the latter built

a wall upon his lot, along the boundary line between them; the same being constructed for him by D. and C. under a written contract. The defendant furnished the materials only, but employed no workmen and exercised no control over them. *Held* that the defendant was not liable to the plaintiff for damages caused by the blowing down of the wall, before it was completed; the relation of master and servant, or principal and agent, not existing between the defendant and those by whom the wall was constructed. *Benedict v. Martin*, 288

#### CORPORATION.

1. A judgment against a corporation, as acceptor of a draft, is *prima facie* evidence, in an action against a stockholder, to enforce his individual liability, that the draft was properly drawn and accepted by a duly authorized officer of the company. *Hoagland v. Bell*, 57
2. Where the name of an individual appears on the stock book of a corporation as a stockholder, this is presumptive evidence that he is so. And in an action against him as a stockholder, the burthen of proving that he is not a stockholder is thrown upon him. *ib*

*Assignment by.* See DEBTOR AND CREDITOR, 16.

#### *Appointment of a receiver.*

3. The statutes provide for but three cases in which a receiver of the property of corporations (other than moneyed corporations) can be appointed: 1. Upon the application of a creditor by judgment or decree, on the return of an execution unsatisfied. 2. When the corporation has been insolvent for a year, or has neglected or refused, for a year, the payment of its debts, or has suspended its business for a year. 3. Upon the application of the directors or trustees, when in their judgment the condition of the corporation makes a voluntary dissolution desirable. *Galwey v. United States Steam Sugar Refining Co.*, 256



4. A receiver of a manufacturing corporation will not be appointed, in an action brought against it by a creditor at large who seeks for a dissolution of the corporation and the distribution of its effects, on the ground of its insolvency, and that its trustees, instead of taking proceedings for the dissolution of the company, intend to facilitate the recovery of judgments against it, by certain creditors, with a view to give them a preference, and thus to effect alienations of the property contrary to law. *MULLIN, J. dissented.* ib

*Foreign corporations, actions against.*  
See LIMITATIONS, STATUTE OF, 1, 2.

See BILLS OF EXCHANGE.

### COSTS.

It seems that when an action is brought by an individual, in the name of public officers, to recover a penalty, the defendant, on showing to the court a state of facts that would prevent his collecting his costs of the plaintiff, may ask for security for costs. *Board of Commissioners of Excise v. Purdy,* 266

See MUNICIPAL CORPORATION, 6.

## D

### DAMAGES.

1. Where, in an action upon a bond given for the purpose of procuring the discharge of a vessel attached to enforce a lien for repairs, the defendants seek to recoup the damages sustained by them by reason of the plaintiffs' neglect to perform their contract for repairs within a reasonable time, the true measure of damages is not the probable profits of the vessel, but the rent or price which would have been paid for the charter, as the vessel was used or chartered at the time. *Rogers v. Beard,* 81

2. In an action to recover damages for the destruction by fire, of fruit trees, through the negligence of the defendant, it is proper for the judge

to instruct the jury that the plaintiff is entitled to recover the value of the trees, as they stood upon his land at the time of the fire, if he is entitled to recover at all; and to refuse to charge that the plaintiff can only recover the diminished value of the land since the destruction of the trees. *Whitbeck v. New York Central R. R. Co.,* 644

3. The true rule of damages is, that if the thing destroyed, although it is part of the realty, has a value which can be accurately measured and ascertained, without reference to the value of the soil on which it stands, or out of which it grows, the recovery must be for the value of the thing thus destroyed, and not for the difference in the value of the land before, and after, such destruction. ib

4. It makes no difference, in this respect, whether the action is brought to recover for the destruction of a single tree, or all the trees in an orchard. ib

5. There is no intrinsic difficulty in estimating the value of a fruit tree, growing upon land, although it has, strictly, no market or commercial value, as a tree, independent of the land which sustains it. ib

6. Such value can be determined by the opinions of competent witnesses, as well as in the case of trees which are usually converted into timber, or fire wood. ib

See AGREEMENT, 10.  
CONTIGUOUS OWNERS.  
EJECTMENT, 1.  
PLEADING, 1, 2.

### DEBTOR AND CREDITOR.

#### 1. Priority of liens.

1. An action will not lie by one judgment creditor, against another, for the purpose of determining the question as to the priority of their respective liens upon the equitable property of the judgment debtor in the hands of the receiver. *Myrick v. Selden,* 15

2. The commencement of a suit in equity, by the service of a summons and injunction, creates a *lis pendens* and a lien in the nature of an attachment or a statute execution, upon the equitable property of the defendant. But the plaintiff is bound to prosecute his action diligently, to retain his lien; or it will cease, like that of a dormant execution. *ib*
3. A delay of eight years, by the plaintiff, in the prosecution of his suit, will be deemed an abandonment or waiver of his prior right acquired by the commencement of the suit, as against a subsequent creditor who has, in the meantime, by his vigilance, discovered and reached a fund sufficient to satisfy his claim. *ib*
2. *Liability of creditors as agents for collection.*
4. Where creditors receive from their debtor the note of a third person, for collection, the proceeds to be applied upon the debt of such debtor, they will be deemed to have assumed the obligation of an attorney or agent for the collection of the demand. *Buckingham v. Payne*, 81
5. They are bound to use ordinary diligence, in the collection of the note, and are responsible for ordinary neglect. Negligence, in such a case, is a question of fact. *ib*
6. They cannot be held liable for the amount of the note, except upon a distinct finding by the referee, as a matter of fact, that the loss of the sum due upon the note was owing to, or consequent upon, their negligence. *ib*
3. *Assignments for benefit of creditors.*
7. A provision, in an assignment executed by a debtor in trust for the benefit of his creditors, directing the payment of a fictitious demand to the assignor's wife, renders the assignment void, as intended to hinder and delay creditors. *American Exchange Bank v. Webb*, 291
8. Where a wife thus provided for in an assignment made by her husband, delivered a release of her dower in his real estate, upon condition that if the assignment should be held valid she should receive the amount directed to be paid to her by the assignment, and if held invalid, that she should have her dower out of the proceeds, and the plaintiff, a creditor, assented to these terms, and to a sale of the property in accordance therewith; *Held* that this did not amount to a ratification of the assignment by him, or estop him from attacking it as fraudulent and void, and having the same set aside. *CLERKE, J. dissented.* *ib*
9. A trust, in an assignment made for the benefit of creditors, "to pay the legal and necessary expenses of the assignees, with a salary to each of them at the rate of two thousand dollars per year while actually engaged in executing the trust, if that compensation do not exceed what the laws of the state allow to executors; if it should exceed that amount, then at the rate so prescribed for executors," &c., does not render the assignment illegal, the provision being a limitation, and not an enlargement, of the legal claims of the assignees. *Keteltas v. Wilson*, 298
10. The liability of bail, or sureties, is one eminently of a confidential character; and the right of debtors, on making an assignment for the benefit of creditors, to prefer any legal obligation, is undoubted. *Per LEONARD, J.* *ib*
11. Hence, a trust requiring the assignees, after having satisfied certain prior trusts, to pay all persons who had theretofore become bail or surety for the assignors such sums as they may have paid, and as may be legally chargeable to the assignors by reason of the liability devolving on such bail or sureties; or to pay such sums as are requisite in law for the discharge of such bail or surety, is not illegal. *ib*
12. Yet where it appeared in evidence that the assignors, though urgently pressed by their creditors with suits to recover their debts, were unwilling to make an assignment, but finally, at the suggestion of a third party, and on account of the rough proceedings of creditors, they executed one, giving a preference in favor of bail and sureties, for the

- declared object of effecting a delay of several years by the operation of this clause, knowing that the clause would produce that effect, and with the intent of putting off creditors, and gaining time to enable the assignors in the meantime to compromise with them; *Held* that the assignment was made to hinder, delay and defraud creditors, and was void as against them. *ib*
13. An insolvent is permitted, by law, to create a trust for the payment of his creditors, and to prefer any of his legal liabilities in the order of payment; but it must be made honestly, for the sole object of providing for the payment of his debts. The debtor is expressly forbidden to make transfers of his property to hinder or delay his creditors; and every such transfer is declared by law to be fraudulent and void. *Per LEONARD, J.* *ib*
14. Where creditors of an insolvent firm entered into an agreement with the latter, by which they covenanted that in case the debtors would execute an assignment of their property to S., preferring therein, as first class creditors, an amount not exceeding \$60,000, and preferring the covenantors to the amount of fifty cents on the dollar on their several claims, they would discharge the debtors from all liability for the balance of such claims; and such assignment was accordingly executed; *Held* that the agreement and assignment were to be construed as constituting parts of one and the same transaction; and that the assignment was on its face fraudulent and void. *Spaulding v. Strang*, 810
15. An insolvent debtor cannot do, by concealment, what he may not do openly. Hence he cannot, by a secret bargain with a portion of his creditors, compel them to agree to his release on condition of his executing an assignment giving them preferences. *ib*
16. Where a corporation formed under the act of February 17, 1848, made an assignment of all its property in trust for the benefit of creditors, *pro rata*, such assignment being made in contemplation of insolvency; *Held* that such assignment was void, notwithstanding it provided for an equal distribution of the assets of the corporation among all its creditors. *Loring v. United States Vulcanized Gutta Percha Co.*, 829
17. There is an obvious distinction, in principle, between an assignment by a debtor of his property to trustees, upon trust for the payment of particular and specific debts, reserving the surplus to the debtor, and an assignment by a debtor of his property and effects to his creditor, upon the trust to sell and pay his own debt, reserving the surplus to the assignor. *McClelland v. Remsen*, 622
18. The latter is in effect a mortgage, and when the debt which it is designed to secure is paid, the property reverts to the original owner. *ib*
19. When property is assigned and transferred to a creditor, to secure the payment of a debt, the surplus, without any special reservation in the deed, would revert to the assignor, the moment the debt was paid and the purpose of the conveyance accomplished. A special reservation can do no more, and is not evidence of a fraudulent intent. *ib*
20. Assignments of property upon trust to pay debts, giving preferences, have never been favored by the courts, and will only be upheld when they fulfill the conditions which the law finds it necessary to prescribe for the prevention of fraud. *ib*
21. Among these are, that the debtor shall devote all his property to the satisfaction of his debts, without condition or qualification; and that he shall reserve nothing from the assigned property, to himself, until all his creditors are paid. *ib*
22. He may prescribe the order in which payments shall be made, giving preferences to favored creditors; but if he reserves any part of the estate to his own use, or for the benefit of himself, in any way, until the debts of all his creditors are satisfied, the assignment will be adjudged fraudulent *per se*, and absolutely void. *ib*
23. Whether one partner can, without the assent of the other, make a gen-

eral assignment of the copartnership effects to a trustee, for the payment of debts, giving preferences? *Quære.* *ib*

24. The authority of one copartner to sell the copartnership property to a particular creditor or creditors in payment of their debts has been judicially determined, and is now the settled law. *ib*

25. The power of a partner to dispose of the property of the firm extends to assignments of it as security for antecedent debts, as well as for all debts to be thereafter contracted on account of the firm. *ib*

26. And where a partner has assigned partnership property to a creditor of the firm, by an instrument in the nature of a mortgage, to secure an antecedent debt, the assignee will hold the property, as against a sheriff who levies on the same by virtue of an execution issued upon a judgment subsequently confessed by the other partner in the name of the firm. *ib*

*See DECREE.*

#### DECLARATIONS.

*See INSURANCE, (LIFE,) 7.*

#### DECREE.

1. Upon making a decree setting aside a deed executed by a judgment debtor, as fraudulent and void against his creditors, the court has no power to direct the premises to be sold, as in case of a sale upon execution, for the purpose of paying the judgment debt. *Walker v. White,* 592

2. In such a case a court of equity acts upon the *person* and not upon the *estate* of the debtor; and may appoint a *receiver*, to take a conveyance of the land from the debtor, and the land may then be sold by the receiver, and a title obtained through his deed. *ib*

#### DEED.

1. Where premises conveyed by deed were bounded easterly by a road or

public highway, without any words indicating an intention to limit the eastern boundary to the westerly line of the road; *Held* that the words of the grant included, by fair interpretation, the one half of the road bed. *Dunham v. Williams,* 136

2. And where the grantees, and those claiming under them, had been in the actual possession of the lands adjoining the road, under such a deed of conveyance, subject to the public easement of the highway, for more than 70 years; *it was held* that they were in the constructive if not the actual possession of the western half of the road bed, sufficiently to enable them to maintain trespass or ejectment. *ib*

*See ADVERSE POSSESSION, 1, 2, 3.*  
*LAKES, 2, 3.*

#### DEMAND.

1. If an account is payable in specific articles upon the demand or request of the creditor, no action will lie upon the same for the recovery of money, nor can such account be used as a set-off, until after a demand and refusal to pay in the specified articles, and in the mode, stipulated in the contract. *Smith v. Tiffany,* 23

2. Where a creditor agrees to receive payment of his debt in lumber at the saw-mill, or in flour, meal, &c. at the grist-mill, of the debtor, there is no duty to pay in money, until the creditor has made his election to receive his pay in some of those articles, and has demanded payment accordingly. *ib*

#### DEMURRER.

*See PLEADING, 7.*

#### DIVORCE.

1. In an action by a wife, against her husband, for a divorce, on the ground of cruelty, the defendant denied the allegations of the complaint, and also alleged, as a separate defense, that the plaintiff had a husband, by a former marriage, living at the time of the marriage of the parties, and

that the former marriage was then in force. He claimed that the marriage between him and the plaintiff was void, and demanded a divorce in his favor, on that ground. The referee reported that the former husband of the plaintiff was living at the time of the marriage of the parties, and refused to grant any divorce to either party, and directed a judgment against the defendant, without costs. *Held* that the report was insufficient as the foundation for a judgment in favor of the defendant annulling the marriage between the parties, even upon the default of the plaintiff at the hearing. *Linden v. Linden*, 61

2. Parties asking the intervention of the court for such relief must prove a full and complete case. Nothing is to be taken in favor of the applicant by presumption or intendment, as to the facts, even in the case of a default in answering, or at the hearing. *Per* LEONARD, J. *ib*

3. The late court of chancery had no authority, in a divorce suit, to require a married woman to accept a gross sum from her husband in lieu of and in satisfaction of her dower. *Crain v. Cavana*, 410

### DOWER.

1. The acceptance, by a married woman, in her husband's lifetime, of a gross sum, from her husband, in lieu of dower, will not defeat her dower. *Crain v. Cavana*, 10

2. And her release of dower to her husband, pursuant to an order of the court, although acknowledged in due form, would be a nullity; she being, *it seems*, legally incompetent to execute such an instrument to her husband, except in the single case authorized by the laws of 1840, p. 128, viz. upon a sale of real estate under a judgment or decree in partition. *ib*

3. A pecuniary provision to bar dower, under 1 R. S. 741, § 12, must be a provision to take effect in possession or profit immediately on the death of her husband. *ib*

## E

### EJECTMENT.

1. Upon the death of a person seised of real estate, all claim for damages done to the estate, and for the rents and profits thereof, down to that time, go to his executor, and belong to the personal estate. Therefore, in ejectment, brought by devisees, the plaintiffs are only entitled to recover the possession of the premises, with damages for withholding the same, and the rents and profits thereof, from the time their title to such rents and profits accrued. *Hotchkiss v. Auburn and Rochester Rail Road Co.*, 600

2. The presumption of payment of the purchase money by one in possession of land under a contract to purchase, arising from lapse of time, cannot be interposed as an affirmative defense to an action to recover the possession of the land. If the presumption is interposed, the fact upon which it proceeds must be affirmatively proved. *Brady v. Begun*, 533

3. The act of April 13, 1861, (*Laws of 1861, ch. 221, p. 538*), amending the revised statutes in regard to judgments in actions of ejectment, does not act retrospectively, so as to apply to judgments rendered prior to its passage. *Bay v. Gage*, 447

*See* DEED, 2.

### ELECTION.

*See* PLEADING, 3.

### ESTOPPEL.

The principle of estoppel does not apply to the unauthorized acts of a predecessor in office, when the action is to charge the successor in his official capacity. *Mather v. Crawford*, 564

### EVIDENCE.

*See* CORPORATION, 1. 2.  
FRAUD, 2, 3.

*See* INSURANCE, (LIFE,) 7.  
PRACTICE, 1, 2.  
SLANDER, 1, 2.

### EXCEPTION.

*See* ADVERSE POSSESSION, 1, 2.

### EXECUTION.

*See* EXEMPT PROPERTY.

### EXEMPT PROPERTY.

1. An execution issued upon a judgment recovered on a note, a portion only of the consideration of which consists of a demand for the purchase money of articles exempt from levy and sale under execution, cannot legally be levied upon such of the debtor's property as is exempted from levy and sale under execution by the provisions of chapter 157 of the laws of 1842, and so much of such property sold by virtue thereof as shall be necessary to satisfy so much of the judgment as shall be equal to such portion of the consideration of the note. *Hickox v. Fay*, 9
2. The statute does not give a general right to the vendor of any articles of the class of exempt property, to take any other of that species of property for his debt. His right is in the nature of a particular lien on specific property, and does not extend to any other property except the precise property sold. *ib*

*See* HOMESTEAD EXEMPTION.

## F

### FIXTURES.

Shelves, drawers and counter-tables, put up by the owner to fit the building for the uses of a retail dry goods and grocery store, and without which the building is not adapted to the business, are, as between vendor and purchaser, fixtures, and a part of the freehold, and the vendor has no right to remove them. *Tabor v. Robinson*, ✓ 483

### FORECLOSURE.

*See* MORTGAGE, 1 to 4.

### FRAUD.

1. An action was brought by R. against W., C. and others, to have a mortgage, executed by D. to W., decreed void on the ground that it was fraudulent and invalid, and to have the premises therein described sold and the avails applied in satisfaction of a mortgage held by R. During the pendency of that action, Craig became the purchaser and assignee of the said mortgage, and brought this suit, against W. and C., to recover damages for false and fraudulent representations made by W. and C., by which he was induced to purchase the D. mortgage of them. *Held* that Craig having become the purchaser of the mortgage during the pendency of the action brought by R. became bound and concluded by the judgment therein, the same as though he had been a party to the record, as a co-defendant with W. and C. That in regard to the subject matter of both actions he stood in legal privity with W. and C., and the questions in respect to the validity or invalidity of the mortgage, by reason of the fraud, were identical. *Craig v. Ward*, 377
2. Accordingly *held* that the judgment record in the suit brought by R. was legitimate evidence, in the present suit, for the purpose of establishing the fraud, and its effect upon the validity of the mortgage as a lien or incumbrance upon the land. *ib*
3. But that this being an action for fraud, Craig was bound to prove, by other evidence, that W. and C. practiced a fraud upon him, in the transfer of the mortgage. *ib*
4. A party making a representation false in fact, renders himself liable, in an action for fraud, although he did not actually know the representation to be false, at the time. *ib*
5. If a party makes a material representation, without knowing whether it is true or false, and it turns out to be false, an action lies for the fraudulent misrepresentation. *ib*



## FRUIT TREES.

See DAMAGES, 2 to 6.

OPINIONS OF WITNESSES, 2, 8.

## G

## GRANT.

See LAKES, 2, 3, 4.

PATENT (FOR LANDS.)

## GRATUITOUS PROMISES.

See AGREEMENT, 12 to 15.

## H

## HIGHWAYS.

1. Where a commissioner of highways institutes proceedings, under the statute of 1847, (*Laws of 1847, ch. 455,*) for a reassessment of the damages of a person whose land has been taken for a road, such land owner is entitled to *notice* of the empanneling of the jury, and of the subsequent proceedings before them. *People ex rel. Stephens v. Tallman*, 222
2. The spirit and intention of the act, in directing the jury to hear the parties and their witnesses, requires that the parties should have notice of the proceeding; and independent of any thing in the statute, no proceeding affecting judicially the rights of another, occurring in his absence without notice, can be valid. *ib*
3. There can be no proceedings by commissioners of highways, for an encroachment upon a highway, in a case where the highway has not been *laid out* and recorded, in conformity with the directions of the highway act. *Doughty v. Brill*, 488
4. The fact that a road has been *used* as a public highway for twenty years or more, will not give the commissioners jurisdiction to proceed against an individual, for an encroachment thereon by fences, un-

less such road has been laid out and recorded as a public highway. *ib*

See COMMISSIONERS OF HIGHWAYS. LAKES, 8.

## HOMESTEAD EXEMPTION.

1. The exemption of property under the act relative to homestead exemptions is a mere personal privilege, which the statute secures to the debtor, and to his widow and children after his decease, which does not run with the land, and which cannot be transferred to another with the land. *Smith v. Brackett*, 571
2. The statute does not exempt the property from becoming *bound* and charged by a *judgment*, but from a *sale* on execution, only, so long as the exemption shall continue in force. *ib*
3. A full and explicit waiver of the exemption will determine the exemption, to all intents and purposes, and leave the property liable to be sold on any execution issued upon the judgment, the same as though no such exemption had ever existed. It will remove the only obstacle to the complete enforcement of the lien and charge created by the judgment. *ib*
4. A judgment against the owner of the homestead will have priority over a mortgage subsequently executed by him, as a lien upon the premises. *ib*

## HOPS.

Hops, growing and maturing on the vines, which are produced by the annual cultivation of the owner, are personal chattels within the meaning of the statute of frauds; and as such are subject to sale like other personal property. *Frank v. Harrington*, 415

## HOUSE OF ILL FAME.

See CARELESSNESS OR NEGLIGENCE.

## HUSBAND AND WIFE.

1. The power of a married woman to charge her separate estate should not be extended beyond the rule laid down by the court of appeals in *Yale v. Dederer*, (22 N. Y. Rep. 450,) viz. that in order to create a charge, the intention to do so must be declared in the contract itself, or the consideration must be one going to the direct benefit of the estate. *Per* INGRAHAM, J. *Owen v. Casaley*, 52
2. A married woman, who had a separate estate, transacted business on her own account, her husband acting as her agent, in conducting the same. The husband employed attorneys to commence suits upon accounts growing out of the wife's business. In an action by the attorneys, against husband and wife, to charge her separate estate with the costs incurred in those suits, there not being enough in the case to show that the husband was in fact, and with the wife's knowledge, acting as her agent in employing the attorneys, and certainly not enough to show that she intended to charge her separate estate, a report of the referee, in favor of the plaintiffs, was set aside, and the case referred back to the referee; the court not being satisfied that all the services rendered were a proper charge on the wife's separate estate. *CLERKE*, P. J. dissented. *ib*
3. Whether a husband, even though his agency in collecting debts due the wife be admitted, has any right to bind the separate estate of his wife, without her knowledge and express assent? *Quære. Per* INGRAHAM, J. *ib*
4. It seems that whether a suit brought in the name of a married woman is or is not for the benefit of her separate estate, must be determined by the intent and object of commencing it, rather than by the result. *Per* GOULD, J. and *CLERKE*, P. J. *ib*

*See* DIVORCE.

## I

## INDORSER.

*See* PROMISSORY NOTES, 1.

## INNKEEPERS.

1. Innkeepers are answerable for the honesty, not only of their servants, but of their guests. *Gile v. Libby*, 70
2. In an action against innkeepers, by a guest, to recover the value of property lost by the latter, proof of the loss or larceny of the goods from the room occupied by the guest, is alone sufficient proof of carelessness on the part of the defendants. *ib*
3. What will amount to carelessness on the part of a guest, which will excuse the innkeeper. *ib*
4. The act of April 13, 1855, to regulate the liability of hotel keepers, was intended to exempt keepers of hotels from liability as to certain property or kinds of goods specified in it, in certain cases, or under certain circumstances, and not to alter or affect the principle or policy upon which their liability was established, or the nature of the contract or duty upon which it was enforced, at common-law. *ib*
5. The exemption of the hotel keeper from liability for the loss of the articles mentioned in the first section of that act, was intended to apply only to such an amount of money, and to jewels, ornaments or valuables, as the landlord himself, if a prudent person, and traveling, would put in a safe, if convenient, on retiring at night. *ib*
6. A watch and chain, and a gold pen and pencil case, are articles not within the meaning or intent of that section, but should be considered a part of the guest's personal clothing or apparel; and the liability of the hotel keeper for their loss is to be determined by the common law rule in such cases. *ib*
7. Where the circumstances render it probable that the goods of a guest are stolen from his room by a fellow lodger, with whom he is placed, notwithstanding his remonstrances, the fact of his neglecting to bolt the door of his room on retiring, as required to do by a notice posted in the room, under the second section of the act of 1855, will not avail the



hotel keeper as a defense to an action to recover the value of the goods stolen. *ib*

8. One who leaves his horse at an inn, without receiving or asking accommodation or entertainment there, for himself, but *to the knowledge* of the innkeeper is provided for and lodged at the house of another, does not become the guest of the innkeeper. *Ingalsbee v. Wood*, 452

9. In such a case, the innkeeper is not bound to receive the horse. If he does, he is not under the extraordinary liability which attaches to his calling or avocation, but his responsibility is that only of an ordinary bailee to whom the custody of property is intrusted for hire. *ib*

10. As such he is bound only to ordinary care—to reasonable diligence and good faith, in the preservation of the property. He can only be made responsible for negligence. *ib*

11. The relation of innkeeper and guest must exist, in all cases, or the liability of the former, as such, does not attach. *ib*

12. The accepting and keeping of the goods of a guest is accessory to the contract implied by law. *ib*

#### INSURANCE (FIRE.)

1. Where, upon contracts of insurance made after the act of June 25, 1853, providing for the incorporation of fire insurance companies, took effect, premium notes were given by the insured, each being for twenty times the amount of the premium paid in cash; *Held* that the notes were within the prohibition of the 18th section of the act, which declares that in no case shall a premium note be more than five times the whole amount of the cash premium; and that they were therefore illegal and void, and could not be enforced against the maker. *Otis v. Harrison*, 210

2. *Held also*, that by force of the 20th section of the act of 1853, the prohibition in regard to the amount of the premium notes, contained in the 18th section, applies to, and is to be

observed by, companies formed under the act of April 10, 1849, and which were in existence at the time the act of 1853 took effect. *ib*

3. *Held*, further, that the giving of such notes was an act not merely *ultra vires*, but was an act expressly prohibited by law. *ib*

4. Policies of insurance are not deemed, in their nature, incidents to the property insured; and do not cover any interest which a person other than the insured may have in the property, as heir, grantee, mortgagee or creditor, unless there be a valid assignment of the policy. *Wyman v. Prosser*, 368

5. The contract of insurance, being a mere personal contract, in no way attached to or running with the real property insured, it does not pass with it, either to a grantee or an heir. The executor or administrator is the only one who can take the contract and enforce it. *ib*

6. A stipulation, in a policy of insurance, that the insurance shall be void, in case the assured, or any other person with his knowledge, shall have existing, during the continuance of the policy, any other insurance on the property, not notified to the insurers and mentioned in, or indorsed upon, the policy, is a material part of the contract between the parties. *Gilbert v. Phoenix Insurance Co.*, 372

7. The parties to a contract of insurance have the right to stipulate between themselves, as to the nature and kind of evidence by which the assent of the insurers to other insurances shall be manifested. And when they have thus stipulated, the court has no power to substitute any other kind of evidence, differing in kind or degree. *ib*

8. Accordingly, a condition (made a part of the contract) that notices of all previous insurances upon the property shall be given to the insurers and indorsed upon the policy, or otherwise acknowledged in writing, at or before the time of making the insurance, otherwise the policy shall be void; and a similar condition in reference to subsequent

insurances; together with a stipulation in the body of the policy that the insurance shall be void in case the insured shall have any other insurance on the property, during the continuance of the policy, not notified to the insurers and mentioned in, or indorsed upon, the policy, constitute a valid agreement; and the failure of the insured to have other insurances effected by him mentioned in, or indorsed upon, the policy, or acknowledged in writing, will render the policy void. *ib*

9. Where a policy of insurance declares expressly, in the body thereof, that the same is made and accepted in reference to the terms and conditions thereunto annexed, one of which conditions is that in case of any loss on or damage to the property insured, it shall be optional with the insurers to rebuild or repair the buildings within a reasonable time, on giving notice of their intention to do so, within thirty days after receiving the preliminary proofs of loss; and within the specified time after proof of loss, the insurers serve upon the insured written notice of their intention to rebuild the building destroyed, no action will lie, upon the policy, to recover the amount of the loss, until the neglect of the insurers to comply with their offer to rebuild, within a reasonable time. *Beals v. Home Insurance Co.*, 614

10. The insurers having elected to pay the loss by restoring the building burned, they cannot be required to pay in any other way. *ib*

11. No action will lie, upon the policy, after the insured has refused to allow the insurer to enter upon the premises, to rebuild, and has himself proceeded to rebuild, without waiting for the expiration of the thirty days within which the insurers were entitled to make the election to rebuild. *ib*

12. A clause in a condition, giving the insurers thirty days within which they shall have the option to rebuild, is not repugnant to another part of such condition, in which it is stipulated that the company will pay the loss "within sixty days." *ib*

13. Where a promissory note, on its face, is payable at such time or times as the directors of a mutual insurance company may, agreeably to their charter and by-laws, require, the presumption is that it was given and taken as and for a premium or deposit note; and no recovery can be had on such a note, unless it has been duly assessed. *Sands v. St. John*, 628

14. But the plaintiff may allege and prove that the note, notwithstanding its form, was given and taken as and for a capital stock note, and used as such in organizing the insurance company, and recover the whole amount thereof, without showing that it has been assessed; such notes being payable absolutely, at maturity. *ib*

15. Actions on capital stock notes must be brought within six years next after the causes of action accrue thereon. *ib*

16. An action may be commenced on such a note, without any actual request, or demand of payment, at the expiration of twelve months, or twelve months and three days, from its date; and the statute of limitations will then commence running, on the same. *ib*

#### INSURANCE (LIFE.)

1. One having an interest in the continuance of the life of another, as his creditor, may insure the life of the debtor, and the contract for that purpose will be valid. *Rawls v. American Life Ins. Co.*, 357

2. The fact that the debt is due to the creditor as a member of a partnership, and from another firm, of which the person whose life is insured is a member, does not alter the rule. *ib*

3. If such a policy of insurance is valid in its inception, the circumstance that the statute of limitations had run against the debt, before the occurrence of the death, will not affect it. *ib*

4. The interest of the creditor, in the continuance of the life of the debtor,

cannot be held to have ceased entirely, because the statute of limitations has operated against the debt. *ib*

5. It is not necessary that the party holding a policy on the life of another should have an insurable interest in such life, at the time of the death, to make the policy valid, if it was valid in its inception. *ib*

6. A life policy is not regarded as a mere contract of indemnity. *ib*

7. In an action by a creditor, upon a policy on the life of his debtor, the declarations of the debtor in his lifetime, in respect to his intemperate habits, or the suppression of information, are not admissible in evidence. *ib*

8. The omission of a person whose life is insured to make any statement in respect to any particular habit, not called for by any general or specific question put by him, will not be such a concealment as to avoid the policy. It is sufficient if he answers truly all the questions put to him, without evasion or concealment. *ib*

J

JUDGMENT.

*See* CORPORATION, 1.

FRAUD, 1, 2.

HOMESTEAD EXEMPTION, 4.

JURISDICTION.

1. A court possesses power and jurisdiction to determine whether it has authority to entertain a particular controversy, although its decision, and the law, be that it has no such authority, and it therefore dismisses the suit. Such a question may be presented by demurrer, and its decision must be a judgment. *King v. Poole*, 242

2. Accordingly, where A. brought an action against B., in a county court, to recover damages for the wrongful detention and conversion of property, and B. demurred on the ground that the court had no jurisdiction of

the subject of the action, and the county court rendered a decision sustaining the demurrer; *Held* that the court had the power to enter a judgment dismissing the complaint or suit, and awarding costs to the defendant. *ib*

3. Costs are a proper and necessary incident of such a judgment; and the court can no more deny them to a defendant who succeeds in establishing, upon an issue of law, that the court has not jurisdiction, than to a plaintiff who has shown that it has. *ib*

4. A court, when it has the parties in an action before it, must necessarily obtain jurisdiction, so far as to decide whether it can entertain the suit; that is, whether it has jurisdiction of the action. Its decision of that question is a judicial act—an exercise of jurisdiction. *Per Emott, J.* *ib*

*See* CITY COURT OF BROOKLYN.

DIVORCE, 8.

PLEADING, 7.

L

LAKES.

1. An inland lake, five miles long and three-fourths of a mile wide, having no current and no main inlet, is not, in any legal or just sense of the term, navigable water. It is not a highway, and is too small to be of any practical use in navigation, except as a connecting link of some chain of internal improvement. *Ledyard v. Ten Eyck*, 102

2. Where the state issued a patent, embracing a portion of such a lake within its boundaries, the northern line crossing the lake, but there was no restriction, or exception of the lake, no reference made to it, and no reservation of the water, or the land under water; *it was held* that the grant carried the southern portion of the lake to the grantee, absolutely. *ib*

3. Where lands are bounded, in a deed of conveyance, by a lake of that description, and the outlet thereof, the

title of the grantee extends *usque ad medium filum aquæ*. At all events, the deed will carry the right to land subsequently filled in, where the water is shallow, immediately in front of the grantee's premises. *ib*

4. Where the state has sold and conveyed land bounded by a *navigable* lake or river, it holds the title to the land under water in front of the premises as *trustee* for the *public*, in order to protect navigation and prevent hindrances or obstructions. At the same time, the state declares itself *trustee* for the *riparian proprietor*, and provides that grants shall be made to him alone, and that they will be made not only for purposes of commerce, but, whenever proper, for the beneficial enjoyment of his adjacent lands. *ib*
5. When the proper and constituted authorities of the state proceed to deepen the outlet of a lake, and deposit the earth and stones that are removed, in the shallow water in front of and adjacent to premises previously conveyed to another by patent, it is a visible and public declaration that that portion of the lake can no longer be used for navigation; and the grantee will enter into possession, and the trusteeship of the state, both for the public and the riparian proprietor, is virtually at an end. *ib*
6. And such land being proper and necessary for the beneficial enjoyment of his adjacent premises, by the riparian proprietor, there arises if not a legal at least a strong equitable title, which being coupled with actual possession, no one, except the state itself, should be allowed to dispute. *ib*
7. No action will lie against such riparian proprietor, in favor of an adjoining owner, to restrain the planting of trees upon such newly acquired land, and thereby obstructing the plaintiff's view of the lake. *BALCOM, J.* dissented. *ib*
8. In New York the public have no highway along the margin of our navigable rivers and lakes, unless the same has been acquired by express grant or prescription. *Per CAMPBELL, J.* *ib*

## LEX LOCI.

See AGREEMENT, 5.

## LIMITATIONS, STATUTE OF.

1. The statute of limitations does not operate as a bar to an action in the courts of New York, against a foreign corporation. *Thompson v. Tioga Rail Road Co.*, 79
2. Such a corporation is within the exception to the operation of the statute, by which the time of absence from the state is not to be taken as any part of the time limited for the commencement of an action. *ib*
3. Where the judge found that the defendant passed through this state more than six years before commencement of the action, but was only here temporarily, and that all the defendants had resided in Pennsylvania since the cause of action accrued; *Held* that the action was not barred by our statute of limitations. *Gans v. Frank*, 320
4. If the debtor comes into this state before process is served on him, and he leaves the state, to reside elsewhere, the statute is not a bar until, after deducting all the time of residing abroad, the debtor has been in this state for six years. *ib*
5. Whether the absence is repeated, or is one continued absence, is immaterial. There must be full six years spent in this state, to make our statute of limitations a bar. *ib*
6. On the 1st of May, 1834, T. loaned to I. \$1500, and took his bond under seal, with this condition: "The condition of this obligation is such, that the above sum of \$1500 is to remain without interest, in the hands of the above bounden I. until such time as the said T. shall demand payment of the said I.; then if the above sum is not paid, the above obligation to be of full force or virtue." *Held* that this was not a mere contract to pay on demand. That the words of the condition, taken together, imported something more than a declaration that the debt was due; and signified that the money was to remain in the hands of the

obligor, and that he was to use it without interest, until called for. That a demand of payment was therefore necessary, before the statute of limitations would commence running. *Sweet v. Irish*, 467

7. And the obligee having died, without making any demand of payment, leaving a will, in which he gave and bequeathed to his daughter H., who was the wife of I., the obligor, the interest of the bond during her life; and if she should die before her husband, then the executors were directed to collect the \$1500, with the interest from the time of her decease; but in case she should survive I., then the executors were directed to collect the money from I.'s estate and pay her the interest thereof each year, and so much of the principal as her necessities should require; it was *further held* that this bequest suspended the payment, as well as the demand of payment, during the joint lives of I. and his wife. That so long as they lived, the principal sum was not due and payable, and the statute of limitations did not begin to run until the death of one of them, at which time the executors were directed to collect the money, and when, by a demand of payment, they could make the money payable. *ib*
8. That by accepting the money upon a contract wherein it was stipulated that there was to be no interest, and the principal payment only at the will of the obligee, the obligor put it into the power of the latter to postpone the day of payment to such time as suited his convenience and pleasure. *ib*

*See* INSURANCE, (FIRE,) 15, 16.

#### LIS PENDENS.

*See* DEBTOR AND CREDITOR, 2.

### M

#### MANDAMUS.

1. Where the legislature, after having imposed a restriction upon the pow-

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er of a common council to contract a debt, directs that notwithstanding such restriction a debt contracted in violation of it shall be paid, the court cannot, when the common council is willing to conform to the legislative will, permit one of the officers of the city corporation to set at naught both the will of the legislature and of the common council. *People ex rel. Baker v. Haws*, 59

2. Thus, where a sum of money had, in pursuance of an act of the legislature, been raised by tax, in the city of New York, for, and appropriated by the common council to, the purpose of paying the relator for printing, &c. done for the city, which sum could not be appropriated to any other purpose; *Held* that this was a clear recognition, by the legislature and the common council, of the relator's right to payment, and a direction by both of those bodies that the relator should be paid. And that upon the comptroller's refusal to apply the fund so appropriated, to the payment of the relator's claim, a mandamus was the proper remedy, where it appeared that no action would lie, against the corporation. *ib*
3. If referees, appointed by a county judge to hear an appeal from an order made by commissioners of highways laying out a public highway, instead of hearing and determining the appeal, dismiss the same, upon a preliminary objection, and thus in effect refuse to execute the trust committed to them, the remedy of the party is not by a common law *certiorari* to review the proceedings, but by a *mandamus*, *it seems*, to compel the referees to proceed. *People ex rel. Ridgeway v. Cortelyou*, 164

#### MARRIED WOMEN.

*See* HUSBAND AND WIFE.

#### METROPOLITAN POLICE BOARD.

1. Rules 15 and 28 of the general rules made by the Metropolitan Police Board, for the government of the police, which direct that all per-

sons who shall be arrested any time when the police courts are not open shall be conveyed immediately to the police station house of the policeman who makes the arrest; and that when a person accused of having committed a *felony* or *misdemeanor* is brought to the station house when the police courts are not open, the officer on duty, after ascertaining that the act charged constitutes a felony or other offense for which a person can lawfully be detained, &c. shall cause the accused to be detained in the station house until the next morning, will not justify the imprisonment in the cell of a station house, of a person who is charged with no offense, other than the breach of a municipal ordinance against riding horses on the sidewalks. *Schneider v. McLane*, 495

2. Where a person is arrested in the day time, in the city of Brooklyn, for violating a city ordinance, it is the duty of the officer to take him before the police justice, or one of the justices elected under the act to establish courts of civil and criminal jurisdiction in that city, passed March 24, 1849. *ib*

3. There is a wide difference between the perpetration of a crime, and the violation of a corporation ordinance. *Per BROWN, J.* *ib*

4. The 28th of the general rules of the Metropolitan Police Board directing the officer on duty to ascertain that the act charged constitutes a felony or other *offense* must be construed to mean a *criminal* offense, and nothing less. *Per BROWN, J.* *ib*

#### MINE.

*See* TENANT FOR LIFE, 1, 2.

#### MOB.

*See* CARELESSNESS OR NEGLIGENCE.

#### MORTGAGE.

1. A regular foreclosure by advertisement under the statute, of a mortgage which has in fact been paid

before foreclosure, but not satisfied of record, and the sale made in pursuance thereof to a *bona fide* purchaser, is equivalent to a sale under a decree in equity; and is an entire bar of all claim of any person having a lien by judgment subsequent to the mortgage, who shall have been duly served with notice of sale. *Warner v. Blakeman*, 501

2. The mortgagor and his assigns may impeach such a sale by showing that the proper statutory proceedings have not been taken to render the foreclosure effectual; but they cannot, after being served with notice of sale, go further and show that the mortgage was fraudulently foreclosed after having been paid, and thereby defeat the title of a subsequent *bona fide* purchaser of the mortgaged premises. *ib*

3. Intermediate judgment creditors, although served with notice of sale, may, within six years after discovery of the fraud, come into a court of equity to set it aside; but the court, in setting it aside, will protect subsequent purchasers who, without notice of the fraud, have advanced their money upon the faith of a regular statutory foreclosure of the mortgage. *ib*

4. Where the mortgagee, in possession of the mortgaged premises, purchases in the premises, and as part of the consideration of such purchase cancels the mortgage debt, he is entitled to protection as against judgment creditors, who become such after the execution of the mortgage. *ib*

5. The delivery up of the bond and mortgage, to the mortgagor, in such a case, to be canceled, does not deprive the mortgagee of his prior lien upon the premises to the full extent of the mortgage debt. *ib*

6. *It seems* that if a borrower of any portion of the United States deposit fund omits to pay the interest due in October and for 23 days thereafter, the mortgage becomes *ipso facto* foreclosed, and the commissioners are seised, at once, of an absolute and indefeasible estate in



fee of the lands; after which there remains only a right of redemption, as specified in the act. *Fellows v. Commissioners for loaning U. S. moneys*, 655

#### MUNICIPAL CORPORATIONS.

1. There is a distinction between the power of municipal corporations over the carriage ways of their streets, and that which they possess over sidewalks. *Hart v. City of Brooklyn*, 226
2. The absolute authority over the roadway, conferred upon the common council by the charter of the city of Brooklyn, is not possessed by them over the sidewalks; and the same responsibility cannot be imposed for the condition of the sidewalks as for that of the roadway. *ib*
3. A municipal corporation is not liable in damages to an individual for injuries caused by an opening in a sidewalk, made by an owner of the soil or the adjacent land, without proof of notice of the insufficiency or defect, and neglect to cause it to be remedied. *ib*
4. The public authorities are not to be presumed to have notice of a latent defect in the covering of an opening in a sidewalk, which was not made by them or under their direction. *ib*
5. Notice to the public authorities of defects or obstructions in the streets, not occasioned by their own acts, must be express, or the defects must be so notorious as to be evident to all who have occasion to pass the place or to observe the premises. *ib*
6. The provision of the act of April 12, 1859, prohibiting the recovery of costs against municipal corporations, unless notice of the claim has been given to the comptroller of the city before suit, is applicable to claims for damages on account of the negligence or misconduct of the city authorities, as well as to demands upon contract. *ib*

#### N

#### NEGLIGENCE.

1. No matter how gross or evident the negligence of the driver of a vehicle, if another, by his own negligence, exposes himself to injury from the vehicle, he has no remedy. *Mangam v. Brooklyn City Rail Road Co.*, 230
2. Knowingly to allow a child of less than four years of age to go at large in a public street, without a protector, is such negligence in his parents or guardians as will, if unexplained, prevent a recovery by him for a personal injury. *ib*
3. The fact that a young child, who has parents or other guardians and protectors, is found alone and unwatched in the street, is presumptive evidence that he was so exposed voluntarily or negligently by his protectors, and that their negligence thus contributed to his injury. *ib*
4. But the fact that the child is in the street alone, or in the way of a vehicle alone, is not conclusive that he is there by the negligence of his protectors. It is a fact which admits of explanation, and notwithstanding which the question of negligence is open to inquiry. *ib*
5. If the child has parents living, and he is under their charge and protection, he is responsible for their acts and omissions, as if they were his own; and for the purposes of an action by him for personal injuries, their negligence must be regarded as his negligence. *ib*
6. Although want of care cannot be imputed to a child, for not avoiding a passing vehicle, it may be charged upon those who have the charge of the child, if they suffer him to go, unprotected, where vehicles are passing, and where care and forethought must be required, beyond what he is capable of exercising. *ib*
7. The question is whether the protector exerted due care and diligence to prevent the child from going where it would necessarily be

in danger; and that question should be left to the jury. *ib*

*See* CARELESSNESS OR NEGLIGENCE. CARRIERS, 1, 2.

## NEW YORK (CITY OF.)

*See* MANDAMUS, 2.

## O

### OPINIONS OF WITNESSES.

1. In an action to recover for damages caused by a collision of boats, it was *held* that it was erroneous to ask the pilot of the defendants' boat, "Was the collision caused by any negligence of yours;" and again, "From what you discovered of the tug in coming down, was she in the fault?" these inquiries calling for the *opinion* of the witness upon the questions put in issue by the pleadings, and which were to be determined by the jury. *Crofut v. Brooklyn Ferry Company*, 201
2. To authorize a witness to give his opinion as to the value of fruit trees, it is not necessary that he should actually have seen, or been familiarly acquainted with, the trees in question. It is enough that he is acquainted with the fruit business in that neighborhood, and the value of similar property there. *Whitbeck v. N. York Central Rail Road Company*, 644
3. After hearing from other witnesses what kind of trees they were, and the quality and amount of fruit yielded by them, generally, he is competent to express an opinion in respect to the value of the trees. *ib*

## P

### PARTNERSHIP.

1. To enable creditors of a partnership to recover a debt against an individual as a partner, on the ground that he held himself out as a partner, they must prove affirmatively that he did so represent and hold himself out, to *them*, or at least that they were informed of such repre-

sentations, before the credit was given to the firm. *Irvin v. Conklin*, 64

2. A person not a partner, in fact, in a firm, will not make himself liable to creditors, for the debts of the firm, by representing or holding himself out as a partner, unless it appears that the creditors gave credit to the firm, *after* such representation or holding out came to their knowledge. *ib*
3. The ground upon which one holding himself out as a partner is held liable as such, to creditors, is that of estoppel. And it is of the very essence of the estoppel, in such a case, that the creditor trusted the firm with knowledge of the fact that the individual either held himself out, or suffered himself to be held out, as a partner. *ib*
4. If there is no evidence that the creditors knew, at the time the goods were sold to the firm, that an individual had held himself out, or suffered himself to be held out as a partner, the latter will not be estopped from denying his liability as such. *ib*

*See* DEBTOR AND CREDITOR, 23 to 26. PRINCIPAL AND AGENT, 5, 6. PROMISSORY NOTES, 1, 2.

### PATENT (OF LANDS.)

1. A patent, issued by the state, conveying its own lands, will be presumed to have been issued regularly; and if it be not void on its face, cannot be avoided collaterally, in a suit between individuals. *Brady v. Begun*, 533
2. It is not incumbent on the grantee to show that the sale of the land was properly and fairly conducted, and that the necessary preliminary notices and advertisement were given and published. *ib*
3. If there be any allegation or pretense that a patent was issued by mistake, or upon a false suggestion, it is voidable only, and in such a case can be avoided only by a direct proceeding to cancel and annul the patent. *ib*

### PAYMENT.

*See* DEMAND. EJECTMENT, 2.



## PERSONAL PROPERTY.

*See* HOPS.

## PLEADING.

1. *Complaint.*

1. A claim for damages done to land occupied adversely by the defendant cannot be sued for and recovered until after the plaintiff has recovered possession. A claim for injuries of that nature cannot be united with a claim to recover the possession of the land. *Hotchkiss v. Auburn and Rochester Rail Road Company*, 600
2. Under section 67 of the code, a plaintiff may unite a claim to recover the possession of land with a claim for damages for withholding the same, and for the rents and profits. *ib*
3. But this provision gives no new rights of action; and the plaintiff is not bound to elect, as between those causes of action, which he will go for. *ib*
4. Under the code of procedure, the objection that the action, whether it be equitable or legal, was not commenced within the time limited by statute, can only be taken by *answer*. The defendant cannot *demur*, on that ground, even where it appears on the face of the complaint, that the cause of action is barred by the statute of limitations. *Sands v. St. John*, 628
5. Hence it is unnecessary for the plaintiff to allege, in his complaint, any facts or circumstances to anticipate or avoid the defense of the statute of limitations. *ib*

2. *Answer.*

6. It is only every *material* allegation of the complaint, not controverted by the answer, that is to be taken as true. Accordingly, where, in an action by the receiver of a mutual insurance company, on a stock note, it was alleged, in the complaint, that the company and the receiver were restrained by injunction, for about five years, from bringing any action on the note in suit, it was *held* that the allegation, being immaterial, could not be taken as true by reason of the omission of the defendant to deny it; and that it was therefore

unnecessary for the defendant to accompany the defense of the statute of limitations with a denial of the allegation. *Sands v. St. John*, 628

3. *Demurrer.*

7. The objection that the facts stated in the complaint do not present a proper case for the exercise of the equitable power of the court to remove a cloud from the title of the plaintiff, is not an objection to the jurisdiction of the court which must be taken specifically for that cause, under subdivision 1 of section 144 of the code, but it may be taken by demurrer under subdivision 6 of that section, on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Hotchkiss v. Elting*, 88

*See* BOND, 1.

## POWER.

*See* TRUSTS AND TRUSTEES, 4, 5, 6, 7.

## PRACTICE.

1. The court can review the findings of the jury on the facts, or set aside the same as against the weight of evidence, only when there is no evidence to sustain the verdict, or it is against the clear and decided weight of the evidence. *Smith v. Tiffany*, 28
2. When the testimony is conflicting, it is the duty of the judge to submit the case to the jury. He will not be justified in taking the case from them and directing a verdict for either party. *ib*
3. In reviewing a judgment rendered by a referee the court acts simply as an appellate tribunal, and must reverse a judgment not warranted by appropriate findings on the questions of fact, if the proper exception is taken. *Buckingham v. Payne*, 81
4. The facts found by the referee must sustain his findings upon the law, and the law of the case must be predicated upon such findings of fact. *ib*
5. Where the facts submitted warrant it, the court may, by virtue of the

- general power which courts exercise over their officers, order the plaintiff's attorney to show his authority to bring the suit. *Board of Commissioners of Excise v. Purdy*, 266
6. But the court will not exercise the power, so far as to dismiss the suit, in an action brought by commissioners of excise, for a penalty, under the act to suppress intemperance, &c. in behalf of a defendant whose only ground of making the motion is that no complaint was made to the excise commissioners before the commencement of the action, that the defendant had violated the statute, and that the commissioners have not authorized the bringing of the suit. *LEONARD, J.* dissented. *ib*
  7. The only order the court will grant, in such a case, is an order to *stay the proceedings*, until further order. *ib*
  8. And *it seems* that on showing to the court a state of facts that would prevent his collecting them of the plaintiffs, the defendant may ask for security for costs. *ib*
  9. When it appears that the defendant was not, and could not have been, misled by a variance between the complaint and the proof, the variance may be disregarded, without amendment. *Craig v. Ward*, 377
  10. When it is obvious that a fact was assumed, on the trial, it is as much in the case as if it were expressly proved. *Paige v. Fazackerly*, 392
  11. If a party acquiesces in a course of proceeding which assumes the existence of a fact, he will be deemed to have admitted it; and the fact will be treated, on appeal, as beyond the reach of any objection not made on the trial. *ib*
  12. When a court of review is satisfied, from the general scope and tenor of the proceedings on the trial, that a particular fact was not a matter of contest, nor a ground of objection there, but was assumed, or taken for granted, in the conduct of the cause, it may and should conclude that the fact was as it was assumed to be. *ib*
  13. After evidence has been duly taken, bearing upon the issues, on a trial, without objection, the judge at the circuit has no power to strike it out, or to exclude it from the consideration of the jury. *Hall v. Earnest*, 585
- See PUBLIC OFFICERS.
- PRINCIPAL AND AGENT.
1. J. G., the sister of the defendant, deposited funds with him, to be invested for her benefit. He invested them in certain stocks and bonds, which he afterwards sold, at a profit. He pretended to invest the proceeds in the purchase of certain city and rail road bonds, but instead of purchasing the same, he was himself the owner of such bonds, at the time, and merely charged the same to J. G., without her previous knowledge or assent, and appropriated the proceeds of the stocks and bonds, first sold, to his own use. He also overcharged J. G. for rail road bonds, which he claimed to have purchased for her, fraudulently retaining the amount of the overcharge. He collected interest on the bonds, for which he never accounted; and he procured from her a release discharging him from all liability to her on account of the use of the trust moneys by him, which was obtained by fraud and concealment, and executed in ignorance of the facts, and of her rights; *Held*, on demurrer, that these facts showed an illegal appropriation by the defendant of the funds intrusted to him, within the principle of the case of *Conkey v. Bond*, (34 Barb. 276;) and that the complaint stated a good cause of action. *Gould v. Gould*, 270
  2. *Held* also that the allegations in respect to the release executed by J. G. were entirely sufficient to avoid it. *ib*
  3. Where an agent has duties to perform towards his principal, in the nature of a trust, he falls within the suspected relation, and the law indulges the presumption of fraud, against a release procured by him from his principal, although no fraud is visible to the eye of the court. *ib*

4. One cannot act for himself as vendor, and as agent for another, as purchaser, in transferring securities. *ib*
5. Under ordinary circumstances, an authority given by a partnership firm, to its agent, to advance moneys for the purchase of notes or bills to be remitted to the firm, will not justify the agent in continuing to make such advances, after being notified of a change in the firm, by the admission of new partners. There must be a renewed authorization by the new firm. *Callanan v. Van Vleck*, 324
6. But if the bills so purchased by the agent, after notice of the change in the firm, have been remitted to the firm, received and receipted by the new members, retained by them, and used and applied in their business, this will justify the agent in inferring that the authority previously given by the old firm was continued by the consent of the new one; and is sufficient to render the new firm liable for the amount of such advances. *ib*
7. An agent cannot act for his own benefit in relation to the subject matter of the agency, to the injury of his principal. *Bruce v. Davenport*, 849
8. An agent is bound to follow the instructions of his principal; and if he neglects to do so, he will make himself liable for the loss or damage which his principal sustains. *ib*
9. The plaintiffs were employed by T. D., in behalf of himself and J. D., who were partners, as their brokers and agents, to sell a certain promissory note held by them, made by third persons, and were instructed to sell the same at a discount of twelve per cent, without their indorsement and without recourse. Subsequently the plaintiffs called upon J. D., in the absence of T. D., and by falsely stating that T. D. had before indorsed similar notes which the plaintiffs had been employed to sell, and concealing from him the fact that T. D. had instructed them to sell without recourse, procured from him the indorsement of the name of the firm upon the note. *Held* that the indorsement having been obtained by an abuse of the confidential relation of principal and agent, did not constitute a contract upon which the latter could sue the former. *ib*
10. *Held also*, that for the same reasons the indorsement could not be considered a modification of the instructions to sell without recourse; and that for whatever damage the principals had sustained, by the disregard of their instructions, the agents were liable. *ib*
11. The rule that when an agent, while strictly pursuing his authority, commits a wrong, he thereby binds the principal, does not apply to a case where the agent departing from the line of his duty is bargaining on his own account, and securing a benefit for his own private advantage, exclusively. *Fellows v. Commissioners for loaning U. S. moneys*, 655
12. When an agent does not pretend, nor assume, to be acting for another, but purely and strictly on his own behalf, and for his own benefit, a subsequent ratification will not bind the principal. *ib*
13. An agent cannot, in general, act so as to bind his principal in matters touching his agency, where he has an adverse interest in himself. But there is an exception, in the application of this principle, in favor of the holders of negotiable paper acquired in good faith before due, for value, without notice of the misconduct of the agent, or the knowledge of such facts as would amount to a want of good faith in the taker of such paper. *Clafin v. Farmers and Citizens' Bank*, 540

See ASSIGNMENT.

HUSBAND AND WIFE, 2, 3.

USURY, 2, 3.

PRIVILEGED COMMUNICATIONS.

1. A statement made to an attorney is no more privileged than one made to any other person, unless it is made for the purpose of obtaining professional advice on the subject of such statement. *Marsh v. Howe*, 649
2. If it is a statement which has no reference to the professional em-

ployment, it falls within the exception to the rule of exclusion, although made while the relation of attorney and client exists. *ib*

8. Accordingly *held* that a statement made by a client, to an attorney, about two years and a half after the latter had obtained a judgment in favor of the former, against D., and several months after the judgment had been assigned by the plaintiff therein to another person, as to the payment of that judgment, was not a privileged communication between attorney and client; the relation of attorney and client, in respect to the action in which the judgment was obtained, being then at an end. *ib*

4. *Held also*, that it was a matter of no moment, so far as related to that question, that the person to whom the statement was made was, at the time, the attorney of the party making it, in another matter, and that they had just before been in consultation in respect to such other matter. *ib*

#### PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

In proceedings supplementary to execution, the court does not appoint more than one person receiver of the property of the judgment debtor, however numerous may be the creditor's bills or supplementary proceedings against him; inasmuch as such appointment in one suit or proceeding completely divests the debtor of his title to all his property. *Myrick v. Selden*, 15

#### PROHIBITION, WRIT OF.

1. The writ of prohibition does not issue to correct errors or irregularities in administering justice by inferior courts, but to prevent courts from going beyond their jurisdiction in the exercise of judicial power in matters over which they have no cognizance. *People ex rel. Brownson v. Marine Court*, 341

2. It ought not to issue where the party has a complete remedy in some other and more ordinary form. *ib*

8. The writ will not be issued upon the ground that the affidavits on which proceedings by attachment were founded did not show certain matters which were necessary, to justify the issuing of the attachment. *ib*

4. Nor will it be issued on the ground that the debt for which the plaintiff was entitled to sue, in the court below, was larger than the jurisdiction of that court permitted to be recovered there; provided the plaintiff, to obviate that difficulty, remits all beyond the amount of which the court has jurisdiction. *ib*

#### PROMISSORY NOTES.

1. Where a promissory note, made by a partnership firm to one of its members, for money advanced by him to the firm, is indorsed by the payee to another, after maturity, the holder may maintain an action thereon against the makers. *Sherwood v. Barton*, 284

2. Such a note may be subject to any set-off which the partnership has; but if no such defense is shown, they cannot avail themselves of the defense that if the note had remained the property of the payee, his remedy would have been by another form of action. *ib*

8. The receipt of a bill or note having time to run, from the party primarily liable on a bill or note then over due, does not operate to discharge an indorser on the bill or note so over due, unless there is an agreement, express or implied, that the new bill or draft shall be in payment of the former, or extending the time of payment in favor of some party who is liable thereon, prior to such indorser. *Taylor v. Allen*, 294

4. If a new draft is taken, by the holder of a protested note, as collateral to such note, this will not prevent him from enforcing payment of the note. *ib*

5. If there is some evidence that a draft was thus taken, the question should be submitted to the jury whether there was an agreement to extend the time of payment on the protested note, or whether the new

was given and received as collateral to the old security. *ib*

6. An instrument by which the maker promises to pay to the order of another a specified sum, at his store, or in goods on demand, for value received, is a negotiable promissory note. *Hosstatter v. Wilson*, 307

7. A promissory note, to be the subject of sale, must be an existing valid note in the hands of the payee, and given for some actual consideration, so that it can be enforced between the original parties. *Hall v. Earnest*, 585

8. A note not valid in the hands of the payee cannot by him be rendered valid by a sale thereof to a bona fide purchaser at a rate of interest exceeding seven per cent. To be the subject of sale, it must have a pre-existing validity. Its breath of life cannot be imparted through a usurious transaction. *ib*

9. The security given to the maker of an accommodation note can have no greater validity than the note itself, and cannot render valid an obligation tainted with usury. *ib*

10. An accommodation note, having in fact, as against the maker, no validity, and never having had any legal inception, is incapable of sale; and one who buys it of the payee takes the precise place of the payee, in respect to the defense of usury, although he purchased the paper in ignorance of its true character, and upon the false representation that it was business paper, and given for value. *ib*

11. If a note is made only for the accommodation of the payee, to enable him to raise money on it, and is sold by him to a third person, for a less amount than upon its face purports to be due thereon, so as to secure to the purchaser a greater rate than seven per cent for the use of his money, the transaction is usurious, and the note is void; whether the purchaser knew, at the time he purchased it, that it was so made, or not. *ib*

12. Turning out a bond and mortgage, to the maker of an accommodation

note, merely as collateral security, to be available to him only in case the payee fails to pay the note, will not furnish a valid consideration for the note, or render the same available in the hands of a purchaser to whom it is transferred upon a usurious consideration. *ib*

## PUBLIC OFFICERS.

1. Actions by public officers, as such, should be brought in their individual names, with the title of their office added. *Paige v. Fazackerly*, 392
2. If, in an action brought by one as "chamberlain, &c.," no objection is taken, on the trial, that the plaintiff is not chamberlain, it will be *assumed*, on appeal, that the fact of his being the incumbent of the office was understood, or taken for granted. *ib*

## Q

### QUARRY.

See TENANT FOR LIFE, 1, 3.

## R

### RAIL ROADS.

1. Where proceedings were taken by the Auburn and Rochester Rail Road Company, before a county judge, under the acts of 1836 and 1838, incorporating said company, for the appointment of a jury of appraisers to assess the value of the land required for the construction of its road through a particular county, and one of the owners of land taken was an infant; *it was held* that it was indispensable that some proper person should be appointed to appear for such infant before the jury of appraisers, to represent her, and attend to her interests, on the appraisalment. *Hotchkiss v. Auburn and Rochester Rail Road Co.*, 600
2. *Held also*, that although an attorney was appointed to appear before the jury and protect the interests of the infant, on the appraisalment, yet if he failed to attend before the jury,

or to represent her interests there, his appointment was nugatory. *ib*

3. That the statute was not complied with simply by the making an appointment of an attorney for the infant owner, by the county judge, sufficient in form; but that it was the duty of the rail road company to see that some reliable person was appointed, residing in the vicinity, who should in fact personally appear before the jury and protect the interests of the infant. And that until such appointment and appearance, the jury had no jurisdiction of her person, to entitle them to proceed to appraise the land, or the damages for taking the same. *ib*
4. The statute was designed to secure the actual attendance of some fit person, before the jury, as guardian or attorney, to attend personally to the interests of the infant upon the appraisement. And without such appearance, all the doings of the jury, in the proceeding, are entirely unauthorized and void. *ib*

#### RAIL ROAD COMPANIES.

1. It is not unlawful, nor against public policy, for a rail road company to convey passengers by stage to and from one of its stations and an adjacent village, in connection with and as a part of its business of transporting passengers upon its road; nor is a contract made by it, thus to carry a passenger, *ultra vires*. *Buffit v. Troy and Boston Rail Road Company*, 420
2. Such a contract is lawful, and the rail road corporation is estopped from denying its validity. *ib*
3. Where a rail road company employs an individual to convey passengers to and fro between a village and a station on the rail road, in stage-sleighs furnished, together with the horses and drivers, by him, such company is liable in damages for any injury sustained by a passenger in consequence of the overturning of a stage-sleigh through the negligence of the owner or his servant. *ib*
4. Where a contract was made, in the city of New York, between R. and

H., a person professing to act as agent for three lines of public conveyances, (including the N. Y. Central Rail Road Co.,) running in connection with each other, to transport R. and her baggage from N. Y. to Cobourg in Canada, and she received from him three tickets, one of which was for a passage over the Central rail road, and such ticket was accepted by the conductors upon the rail road, as evidence of R.'s right to ride upon the cars as a passenger; they marking it, and taking it up at or near the end of the route, in the usual manner, without demanding any fare of her; *Held* that there was sufficient proof of an undertaking on the part of the Central rail road company to transport R. and her goods over its road; and that the company's conductors, whose business it was to look to such matters, having accepted and treated R.'s ticket as sufficient, the law would presume the undertaking made by H. on behalf of the company was valid, and binding upon such company, until the contrary appeared. *Glasco v. New York Central Rail Road Co.*, 557

5. The obligation of a rail road company is to take whatever is delivered and received as baggage, from a passenger, in the baggage car of a passenger train in which the passenger takes his passage, and take it along with, and deliver it to, the passenger, at the place of destination, in the usual manner of transporting and delivering baggage. *ib*
6. The obligation is the same, whether the baggage is within the quantity allowed to a passenger, to be carried without any charge, other than the ordinary fare of the passenger; or whether it is an extra quantity, for which an additional charge is made. *ib*
7. If it be taken as the baggage of the passenger, whether ordinary or extra, it is to be carried with the passenger; unless there is some agreement to the contrary. *ib*

#### RECEIVER.

*See* CORPORATIONS, 3, 4.  
DECREE.



## RECOGNIZANCE.

An indictment being found against C., he was, on the 6th of June, 1860, arraigned in the court of oyer and terminer, and pleaded not guilty. Bail was fixed at \$700, and C. as principal and F. as surety were recognized for the appearance of C. at the next oyer and terminer, in October, to answer the indictment, by an entry made in the minutes of the court, which merely recited the arraignment of C. upon the indictment, and that he was ordered by the court to enter his recognizance in the sum of \$700, and that thereupon C. was recognized in that sum as principal, and F. as surety. C. appeared at the oyer and terminer in October, when another indictment was found against him, and filed on the morning of the 10th of October, for the same offense charged in the previous indictment. On the afternoon of the same day a third indictment was found, C. was arraigned thereon, and pleaded not guilty, and on motion of the district attorney, an order was entered in the minutes, quashing the first two indictments. C. then departed from the court without its express permission. On the next day an order was entered, directing the recognizance of June 6, to be written out in full and attached to the minutes as of that date, and that the minutes and entry of such recognizance be corrected, &c. Thereupon another order was entered, directing such recognizance to be estreated, and prosecuted. The clerk, pursuant to the order, drew up from his minutes a recognizance, as of the 6th of June, and attached the same to the minutes kept by him at the June term, and also to the book of records, by pasting the same therein. In an action upon such recognizance; *Held*, 1. That the entry in the minutes of the court was defective in not stating the acknowledgment of indebtedness, and therefore no legal recognizance was entered into by C. and F. 2. That the entry being defective, there was no memorandum from which to make up a recognizance, and hence there was nothing on which to base the action. 3. That the court had not authority, *ex parte*, to manufacture an undertaking imposing obligations upon the accused and his surety

never assumed by them. 4. That quashing the indictment which the accused had given bail to appear and answer, was a discharge of the obligation, released the surety, and authorized the prisoner's departure from court without special leave. *People v. Felton*, 429

## REFEREE.

See PRACTICE, 3, 4.

## RELIGIOUS SOCIETIES.

1. Where the right of persons claiming to be trustees of a religious society, to the office of trustee, is disputed and denied, and they have not yet been admitted to the exercise of any of its rights or duties, and they are not and have not been in possession of the church edifice, nor of any of the temporalities of the church, they cannot maintain an action in the name of the religious society, to restrain individuals in possession and claiming to be the trustees of the society, duly elected, from closing the church edifice and from preventing the pastor from holding religious meetings therein, &c. *North Baptist Church v. Parker*, 171
2. Before they can institute or maintain such an action, the plaintiffs must have been peaceably admitted to the office of trustees of the society, or have established their title thereto by a direct proceeding or action brought for that purpose, by the attorney general. *ib*
3. The court will not, upon motion, decide who are the rightful trustees of the society, or determine the question of right to the office. *ib*
4. Religious societies incorporated under the act of 1813 are not expressly or even impliedly authorized to take lands by devise, for any purpose whatever, when such devise is made after their incorporation. *Goddard v. Pomeroy*, 546

## RES ADJUDICATA.

The question involved in a suit brought to establish a will as a lost

or destroyed will, and in a subsequent action of partition between the same parties where such will is sought to be established as a lost or destroyed will, by a party claiming under the same, are identical. The same proof is required, to establish the will, in either case; and the question having been once passed upon by a competent tribunal, must be deemed at rest, and the former judgment conclusive. *Harris v. Harris*, 88

### RIOT.

*See CARELESSNESS, &c.*

## S

### SALE OF LAND.

*See DECREE.*

### SET-OFF.

*See DEMAND, 1.*

### SHERIFF.

1. A sheriff acts *officially* in selling the property of a stranger to the execution as the property of the defendant therein. *Ball v. Pratt*, 402
2. He may take an indemnity from the plaintiff, for such an act, when done in good faith, but cannot give an indemnity to the bidders at the sale. *ib*
3. Where an under sheriff agreed with the bidders at a sheriff's sale to warrant the title to the property sold, *held* that such an agreement rested upon no consideration of benefit to the sheriff, except as it necessarily tended to increase the fees and perquisites of his office; and that in that respect it was void, as against public policy. *ib*
4. A sheriff, while in the discharge of his official duty, cannot divest himself of his official character, and do as an individual what he cannot do as a public officer. *ib*

### SHERIFFS' SALES.

1. A paper signed by an individual, on becoming a purchaser of property

at a sheriff's sale under a judgment, by which he agrees to comply with the conditions of sale, is not a contract, either with the sheriff or the plaintiff in the foreclosure suit, upon which an action can be maintained by the latter as the assignee of the sheriff. *Miller v. Collyer*, 250

2. Such an instrument, in the form of a memorandum at the foot of the conditions of sale, signed by the purchaser, is merely a submission by him to the jurisdiction of the court, in the foreclosure suit, as a purchaser under the judgment therein. It lacks some of the essential elements of a contract; such as parties, mutuality and consideration. *ib*
3. *It seems* that conditions of a sale by a sheriff on execution, imposing upon the purchaser a liability to pay the amount of any deficiency in case of a resale, will not apply to any case except that of a resale made forthwith, upon failure of the purchaser to pay the required percentage of his purchase. *ib*

### SIDEWALKS.

*See MUNICIPAL CORPORATIONS.*

### SLANDER.

1. An action for slander, in charging the plaintiff with having "*stolen tea*, sugar and calico and carried it away," will not be sustained by proof that the defendant alleged the plaintiff "*took tea and coffee from her [the defendant] and she found them in her things;*" or that "*she [the plaintiff] had taken tea and calico,*" &c. *Coleman v. Playsted*, 26
2. The words proved not being actionable *per se*, inasmuch as they do not necessarily impute the commission of a crime, an action can be sustained upon them only by proving that they were uttered with intent to impute a felonious taking of the goods, and were so understood by the hearers. *ib*
3. Where the judge, in such a case, disregards the variance between the words stated in the complaint and the words proved, and allows the case to go to the jury upon the



proofs, on a charge submitting the question of the actual meaning and sense of the words used, this will be equivalent to an amendment of the complaint on the trial, substituting the words proved for those alleged in the complaint. *ib*

4. The court will therefore treat the complaint as amended, or allow it to be amended *nunc pro tunc*, to sustain the verdict. *ib*

5. Where the question submitted to the jury is, what was the meaning and sense of the words proved, as understood at the time, all that was said by the defendant during the same conversation, and in the same connection, is admissible in evidence, for the purpose of giving character to the words spoken, and showing malice. *ib*

6. Words charging one with keeping a whore house are actionable, *per se*. They impute a crime involving moral turpitude, and which crime is also an indictable offense. *Wright v. Paige*, 488

7. The charge of keeping a whore house is synonymous with a charge of keeping a bawdy house, or house of ill fame; it being a charge of keeping a house for common prostitution. *ib*

8. In an action for slander, the words are to be construed according to their common acceptation; and it is not admissible to inquire of the witnesses how they understood them. *ib*

#### STATUTES.

The act of April 9, 1859, to amend the charter of the Poughkeepsie Fire Insurance Company, does not affect the question of the validity of premium notes previously taken by that company, in violation of the act of 1858. *Otis v. Harrison*, 210

See CONSTITUTIONAL LAW.  
EJECTMENT, 3.

#### STREETS.

See MUNICIPAL CORPORATIONS.  
NEGLIGENCE.

#### SUBSCRIPTIONS.

See AGREEMENT, 12 to 15.

### T

#### TAXES AND TAXATION.

See CONSTITUTIONAL LAW, 8, 4, 5.

#### TENANT FOR LIFE.

1. A tenant for life, or for years, or for a single year, has the right to work a mine or quarry that has been worked and is open at the commencement of his tenancy; for it has become the mere annual profit of the land. *Freer v. Stotenbur*, 641

2. A lease, in general terms, of the land in which an open mine exists, carries the right to the lessee to work the same. *ib*

3. And the right of action for quarrying and taking away the stone from an open quarry is vested in the lessee named in the lease of such quarry, or whoever has his interest in it. *ib*

#### TRUSTS AND TRUSTEES.

1. A trust, in a deed of real estate, to convey the premises to such person or persons as the wife of the grantor shall by writing appoint, is not one of the trusts authorized by law, and is therefore absolutely void. *Hotchkiss v. Elting*, 88 ✓

2. Where the trustee is not vested with the right to the possession, rents or profits of the land conveyed, for any purpose, either for himself or any other person, the deed of trust will be regarded as void, under the provisions of the revised statutes. (1 R. S. 728, § 49.) *ib*

3. Where an instrument purporting to create a trust in respect to real estate is void upon its face, it will carry its own condemnation with it, and will not be in a proper and legal sense a *cloud* upon the title, which will authorize the interference of a court of equity, to set the instrument aside. *ib*

4. A power to a trustee to hold the premises conveyed, in trust for the grantor's wife, and to convey the same to such person or persons as the latter shall by writing appoint, is a valid power in trust, at the time of its creation and during the life of the *cestui que trust*. And if the act of appointment is exercised by the wife during her life, the power vested in the trustee will become operative, and its execution on his part imperative. *ib*

5. But if the wife dies before her husband, and during the existence of his life estate, without having exercised the power of appointment, the power will cease to exist, and can never thereafter be exerted. Its execution having become impossible, for all practical purposes, the power may thenceforth be regarded as forever extinguished. *ib*

6. In such a case, the estate, having never passed out of the grantor, remains in him. His estate not having been defeated by the execution of the power during his wife's lifetime, it cannot be, after her death; and he will thenceforth hold the property free from any condition whatever. *ib*

7. The existence of a power in trust, valid in itself and once capable of execution but now incapable of execution by reason of the death of the person having the power of appointment, without an exercise of the power, does not present a case fit for the exercise of the equitable power of the court to remove a cloud upon the title, by reason of the necessity of resorting to extrinsic evidence to establish the extinguishment of the power. *ib*

*See WILL, 2.*

#### TURNPIKE COMPANIES.

Where the language of an act of the legislature, incorporating a turnpike company, is such as to vest the title to the land over which the road passes, in the company, it must nevertheless be considered as vested only for the purposes of the road; and when the road is abandoned,

the land reverts to the original owners. *Dunham v. Williams*, 136

*See BROOKLYN, JAMAICA AND FLAT-BUSH TURNPIKE Co.*

### U

#### UNITED STATES DEPOSIT FUND.

*See MORTGAGE, 6.*

#### USURY.

1. An agreement by a borrower, to pay a subsisting debt of his own, in consideration of a new credit, or a further loan, is not usurious, if the promise is to pay only the amount actually due on the old debt, and the amount of the loan with lawful interest. *Marsh v. Howe*, 649

2. The payment of a bonus, by a borrower, to the agent through whom a loan is made, without the knowledge or assent of the principal, does not constitute usury, so as to invalidate the security taken on the loan. *Fellows v. Commissioners for loaning U. S. moneys*, 655

3. R. and P., who were commissioners for loaning certain moneys of the United States, within a certain district, appointed by the state, and acting under a special and limited authority defined by law, and having no power to act for their principal, the state, except that contained in the statute, made a loan to F. of \$500, of the public moneys, taking from him a mortgage to secure the payment thereof, and exacting and receiving from him \$15, by way of bonus to themselves. *Held* that this did not render the mortgage void for usury. *ib*

### V

#### VARIANCE.

*See PRACTICE, 9.*

#### VRNDOR AND PURCHASER.

1. Whenever a vendor has manifested an intention not to rely on his lien

- upon the lands sold, for the purchase money, he will be considered as having waived it. *Coit v. Fougere*, 195
2. So if a vendor, for a portion of the purchase money, agrees to take a conveyance of other property, and a deed of such property is accordingly executed by the vendee, and delivered in escrow, the lien of the vendor will be gone. *ib*
  3. If, in such a case, the depository refuses to deliver the deed, the remedy of the vendor is upon the agreement of sale between him and the purchaser, to compel the delivery of the deed. *ib*
  4. The remedy against a purchaser who refuses to complete a purchase under a decree or judgment of a court of equity, is by an application to the court to compel him to complete it, or to resell the property, and hold him liable for the loss and the additional expenses. *Miller v. Collyer*, 250
  5. A vendor who has sold goods and drawn bills upon the purchaser, for the price, can rescind the sale, and sue for the value of the goods, if he has good cause for doing so, notwithstanding the bills, at the time of the commencement of the action, are out of his possession, so that he cannot then surrender them. If he produces the paper at the trial, and there offers to surrender it, or cancel the acceptances, that is sufficient. *INGRAHAM, P. J. dissented. Frasier v. Henriques*, 276
  6. Upon an agreement for the sale of land, where the payment of the purchase money and the delivery of the deed are concurrent acts to be done at a future time, the purchaser has an equitable interest in the land, and a right to a specific performance of the agreement by the execution and delivery of the deed at the time appointed, upon his paying the purchase money. But he is not the owner of the property purchased, until the happening of those events. *Tabor v. Robinson*, 483
  7. Until he has performed the contract, on his part, he is not vested with the right of property, and cannot assert the legal rights, or claim

the legal remedies, which belong to those who own the title. *ib*

8. For a removal of the fixtures, occurring between the execution of the agreement and the time appointed for the payment of the purchase money and the delivery of the deed and of the possession of the land, the purchaser cannot maintain an action against the vendor. *ib*
9. A demand of the fixtures, from the vendor, and a refusal to deliver them, made prior to the time fixed for completing the agreement and delivering the possession, will not avail the purchaser, or remove the impediment in the way of his maintaining an action *ib*

See SHERIFFS' SALES.

## W

### WILL.

#### 1. Construction and validity.

1. A testator, by his will, gave to his wife certain articles of personal property and one-third of the net income of all his real estate, after payment of all taxes, assessments and interest due thereon, during her natural life. Upon her death the payments were to cease, and the said one-third of the net income was to go and be paid to the heirs of the testator. The provisions were not stated to be in lieu of dower. *Held* that the widow was not put to her election. *Tobias v. Ketchum*, 804
2. A testator, by his will, gave to his wife, after the payment of his funeral expenses and all honest debts, all his personal estate absolutely, except \$1000 due him in notes, and the interest of that \$1000 during her life. He also gave her the whole income of all his real estate, for life, absolutely. He then gave to three other persons, E., H. and P., legacies amounting in the aggregate to \$3500, which were not to become due until after the decease of his wife. He next gave "the whole remaining part of all my worldly property which it is supposed will exceed \$3000," to the Baptist church

in York, upon certain conditions, one of which was as follows: "That the legacy be kept by the church in perpetual fund, on interest, and interest applied for the purpose of remunerating the services of some faithful minister of Christ, and of the Baptist order, who shall be employed by the church as their missionary, in preaching the gospel in the destitute regions of the west."

*Held* 1. That having no power to take by devise, for any purpose, the church acquired no right, but the devise and the trust founded upon it, were entirely void, and the estate descended to the heirs at law, subject to the life estate of the widow, at the death of the testator. 2. That the trust to provide for the payment of the salary of a missionary to be employed in preaching the gospel in the destitute regions of the west was void, for the reason that the object of the charity was too vague and uncertain, and the testator had failed to express his purpose with sufficient clearness and precision to enable the court to decree its specific execution. And that were it any other than a charitable trust, it would be clearly void for want of any certain beneficiaries who could enforce it. 3. That the testator intended that the three legacies to E., H. and P. should be principally paid out of the real estate, although they were not to become due until the death of the testator's widow; an intention being manifest, from the whole will, to give to the Baptist church only the part of the estate which should remain after the other legacies were paid and satisfied. 4. That the charge upon the real estate, for the payment of the legacies, followed the estate in the hands of the heirs at law. *Goddard v. Pomeroy*, 546

2. *Lost or destroyed will.*

3. The section of the revised statutes relative to the proof of wills as lost or destroyed wills, provides one common and invariable rule in re-

gard to the validity or effect of lost or destroyed wills taking effect after the passage of the act, viz:

1. That the loss or destruction must have occurred after the death of the testator, unless it happened fraudulently in his lifetime. 2. That in consideration of the importance of the instrument, and the uncertainty of parol testimony, its contents shall be clearly and distinctly established by two credible witnesses. *Harris v. Harris*, 88

4. The language of the statute is general and unqualified, and the provision was intended as a rule of evidence of universal application to all subsequent cases, prescribing certain indispensable prerequisites to the proof, in any tribunal, for any purpose, of wills alleged to have been lost or destroyed; and is not to be limited to affirmative proceedings taken directly for the purpose of establishing such a will. *ib*

5. Hence, an instrument cannot be proven and established in any form, for any purpose, or between any parties, as a lost or destroyed will, unless its provisions are clearly and distinctly proved by at least two witnesses, or a correct copy or draft as an equivalent or substitute for one of them. *ib*

WITNESS

1. After impeaching witnesses are shown to be acquainted with the general moral character of the person whose credit is assailed, and they declare it bad, the question of credit is for the jury, under proper comments from the court, without any inquiry of the discrediting witnesses as to whether they would believe him under oath. *Wright v. Paige*, 438

2. In such cases the jury ought not to be precluded from drawing the fair and reasonable inferences from the evidence. *ib*

7541.065x. J. E. A.





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